Supreme Court, U.S.
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No. 05-927

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a Federal Trade Commission regulation applicable to some but not all charitable solicitations permitted to be underinclusive under the First Amendment to the Constitution because that underinclusiveness is caused by the Commission's lack of jurisdiction over non-profit organizations?

Does the regulation otherwise violate First Amendment protections of fully-protected speech by charitable organizations?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The caption to this case contains the names of all parties. Petitioners have no parent corporations and as a non-profit organization are not owned by any publicly-held company pursuant to Supreme Court Rule 29.6.

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CITATIONS OF ORDERS ENTERED IN CASE

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JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on August 26, 2005. A petition for rehearing and rehearing en banc was denied on October 25, 2005 (Appendix, Infra, 1a). The jurisdiction for this Court is evoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The pertinent provisions of the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.*, and the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*, are reprinted in an appendix to this petition. App., *Infra*, 72a-113a.

The Crimes Against Charitable Americans section of the USA PATRIOT Act reads:

> CRIMES AGAINST CHARITABLE AMERICANS.
>
> (a) Short Title.—This section may be cited as the "Crimes Against Charitable Americans Act of 2001".
>
> (b) Telemarketing and Consumer Fraud Abuse. —The Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101 et seq.) is amended—
>
> (1) 15 U.S.C. 6102 in section 3(a)(2), by inserting after "practices" the second place it appears the following: "which shall include fraudulent charitable solicitations, and";
>
> (2) in section 3(a)(3) —
>
> (A) in subparagraph (B), by striking "and" at the end;
>
> (B) in subparagraph (C), by striking the period at the end and inserting "; and"; and
>
> (C) by adding at the end the following:
>
> "(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made."; and

(3) 5 U.S.C. 6106 in section 7(4), by inserting, "or a charitable contribution, donation, or gift of money or any other thing of value," after "services".

(c) Red Cross Members or Agents.—Section 917 of title 18, United States Code, is amended by striking "one year" and inserting "5 years".

(d) Telemarketing Fraud.—Section 2325(1) of title 18, United States Code, is amended—

(1) in subparagraph (A), by striking "or" at the end;

(2) in subparagraph (B), by striking the comma at the end and inserting ; "or";

(3) by inserting after subparagraph (B) the following:

"(C) a charitable contribution, donation, or gift of money or any other thing of value,"; and

(4) in the flush language, by inserting "or charitable contributor, or donor" after "participant".

107 P.L. 56, §1011 (2001).

STATEMENT OF FACTS

1. In 1994, Congress enacted the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.* ("Telemarketing Act"). The statute authorized the FTC to regulate deceptive and abusive commercial telemarketing acts and practices intended to induce the purchase of goods or services. 15 U.S.C. § 6102(a)(3)(C), App. 72a.

2. Congress mandated that no activity outside the jurisdiction of the FTC Act shall be affected by the Telemarketing Act. 15 U.S.C. § 6105(a), App. 80a.

3. The FTC promulgated regulations in 1995. *See* 60 Fed. Reg. 43842 (Aug. 23, 1995) (codified at 16 C.F.R. §§ 310.1 et seq.) ("TSR"). The FTC's Statement of Basis and Purpose states that: "[t]he FTC Act itself establishes exemptions from its coverage, and the Telemarketing Act provides that

authority under the Rule may be no broader than under the FTC Act." *Id.* at 43843. These regulations did not apply to charitable fundraising telephone calls.

4. Congress enacted the USA PATRIOT Act in October, 2001. Section 1011 of the USA PATRIOT Act is entitled "Crimes Against Charitable Americans" and was introduced by Sen. Mitch McConnell (R-KY). Section 1011(b)(1) of the USA PATRIOT Act directed the FTC to promulgate regulations to prevent "deceptive telemarketing acts or practices" including "fraudulent charitable solicitations." Section 1011(b)(2) directed the FTC to promulgate regulations which shall include:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Section 1011(b)(3) altered the definition of "telemarketing" in the Telemarketing Act by inserting the language "or a charitable contribution, donation, or gift of money or any other thing of value." This language is not otherwise limited in the regulation, although the FTC has explained it does not include political fundraising or solicitations within "charitable contribution" such that this section applies to political calling. 68 Fed. Reg. 4580, 4589 n. 106 (Jan. 29, 2003.)

5. The USA PATRIOT Act did not amend the FTC Act to give it jurisdiction over non-profits:

> [n]otwithstanding its amendment of these provisions of the Telemarketing Act, neither the text of Section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act—the provision which

> incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR.

67 Fed. Reg. 4492, 4496, col. 3 (Jan. 30, 2002).

6. In October 2003, the FTC adopted amended regulations implementing this law by amending the TSR. The TSR imposes three substantive restrictions on charitable fundraising calls delivered by professional representatives (but not on charitable fundraising calls conducted by a charity's employees or volunteers):

> 1) regulates "abandoned" outbound telephone calls initiated by a charity through a compensated agent,
>
> 2) requires transmission of caller identification calls for charities' calls delivered through a compensated agent, and
>
> 3) demands acquisition of expensive technology that delivers a recorded message in the event of an "abandoned call."

7. A violation of the TSR is subject to enforcement by the FTC as an unfair or deceptive act or practice, including penalties of $11,000 per violation. 15 U.S.C. § 6102(c), App. 73a. The Telemarketing Act also permits enforcement by a state and civil actions by aggrieved private persons. 15 U.S.C. §§ 6102(a), 6103(f), 6104(a), App. 72a, 77a, 78a.

8. The FTC lacks jurisdiction over the following types of commercial entities: supervised banks, common carriers and common non-profit organizations. 15 U.S.C. § 6105(a), App. 80a. The FTC also lacks jurisdiction over all calls placed in intrastate commerce. 15 U.S.C. § 6106(4), App. 81a; 68 Fed. Reg. at 4587.

9. The FTC has interpreted the abandonment provision of the TSR to bar prerecorded telephone calls on behalf of charities because such calls are not connected to a "sales representative" but rather a prerecorded message. *The Broad-*

Cast Team, Inc. v. Federal Trade Commission, 6:05-cv-1342-ORL-22JGG (D. Fla., M.D., 2006) (Order Denying Preliminary Injunction).

10. The FTC has promulgated a proposed amendment to the TSR which would expressly allow prerecorded calls to persons with whom the caller has an established business relationship. 69 Fed. Reg. 67287 (Nov. 17, 2004). Under this proposal, some prerecorded commercial calls (to established customers) would be allowed if they contain certain disclosures. *Id.* at 67294. This document notes that the FTC will not enforce its abandonment provision against prerecorded calls to established customers pending the finality of this proposed change if the calls comply with the proposed amendment. *Id.* at 67290.

11. Both Petitioners submitted affidavits in support of their Motion for Summary Judgment to the District Court attesting to the potentially devastating effect the TSR will have on their fundraising and program services and the reasons their organizations use compensated agents to raise funds for their charitable programs.

ARGUMENT

The amended TSR restricts some charitable solicitations and not others based on whether the charity making the appeal hires a professional representative. There has been, however, no empirical finding that those solicitations are in any way more abusive, annoying or intrusive than exempt solicitations. This Court has ruled, in fact, the solicitations by charities using professionals are entitled to the exact same protections under the First Amendment that "in house" speech enjoys. These restrictions therefore burden only those charities which can not afford to conduct solicitations using employees or volunteers, "necessarily" discriminating against small or unpopular organizations. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 (1988).

Petitioners pray this Court issue a writ of certiorari to the Fourth Circuit Court of Appeals to review and correct its decision which held this underinclusiveness is permissible because it is caused by the FTC's lack of jurisdiction over non-profit organizations themselves (but not their professional representatives). The Fourth Circuit's decision would uphold an underinclusive regulation in violation of the First Amendment and is contrary to this Court's decisions in *Riley, supra*, and *Cincinnati v. Discovery Network*, 507 U.S. 410, 426 (1993).

Because the FTC lacks jurisdiction over many types of commercial entities, intrastate calls, charities which raise funds through employees or volunteers ("in house" calling), and political or religious fundraising, the TSR is underinclusive. The Fourth Circuit ruled that this underinclusiveness is caused by the FTC's lack of jurisdiction or agency interpretations (in the case of political calling) rather than the explicit terms of the regulation. Thus two statutes acting in concert, the first limiting an agency's jurisdiction, and the second applying to all commercial telemarketing, impose restrictions solely on those charities which must use professionals, and exempts charities large or wealthy enough to conduct their fundraising "in house". This opinion, if permitted to stand, would enable Congress to circumvent the Constitution at will by using two statutes to accomplish ends forbidden if accomplished by a single law.

The Decision conflicts with the holdings of the Supreme Court because it ruled that the FTC's Telemarketing Sales Rule's ("TSR") restrictions on charitable fundraising are narrowly tailored to further legitimate government goals even though application of the TSR is underinclusive. FTC regulatory action, further, has broadened the TSR's underinclusiveness beyond the scope of the FTC's jurisdictional

limits (thus the TSR is now underinclusive for more reasons than solely the FTC's lack of jurisdiction over certain types of entities).

In effect, the Decision would allow an unconstitutional regulation to stand because it is the product of two statutes, instead of just one. It is clear that if this discrimination were caused by one statute, it would be unconstitutional. Hearing by this Court is necessary to correct the Decision on this issue: the protections found in the Constitution are not so easily evaded.

The Decision conflicts with two lines of Supreme Court cases: the first bars restrictions applicable only to charities which use professional representatives as underinclusive and discriminatory, and the second prohibits indirect as well as direct attacks on the protections guaranteed by the Constitution.

First, three Supreme Court cases hold that regulations applicable solely to charitable appeals delivered by professionals improperly discriminate against small or unpopular speakers. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). This Court has also held that there is no connection between the FTC's restrictions and the prevention of fraud or protection of residential privacy.

The Decision holds, however, that there is an adequate basis to assume, without empirical evidence, that professionals are more likely to engage in fraudulent charitable solicitations than charity employees or volunteers. Decision, App. 27a-28a. The dissent notes the FTC admitted at oral argument that "there is 'no empirical evidence' in the administrative record to support this assumption." Decision, App. 36a. In fact, the Decision conflicts with *Riley*, 487 U.S.

at 789-90, *Munson*, 476 U.S. at 966-967, and *Schaumburg*, 444 U.S. at 636-37, which all ruled that there is no connection between whether a person is paid to help a charity deliver its appeal and whether that appeal is fraudulent or not. This is just the sort of prophylactic assumption banned by the First Amendment, which requires the government use "sensitive tools" when regulating speech. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Similarly, the FTC neither presented nor gathered any evidence that its restrictions on the professional representatives of Appellants are likely to protect residential privacy. Decision, App. 37a. The Supreme Court has ruled that it is the burden of the FTC to prove that it makes sense to treat Appellants differently from other charities with regard to protection of privacy. *Discovery Network*, 507 U.S. at 426. The FTC did not and can not do this and the Fourth Circuit erred in agreeing with the FTC. Supreme Court review is necessary to correct this error.

Second, the Constitution can not permit underinclusiveness to be cured by two or more laws acting in concert. To allow unconstitutional statutes to survive scrutiny for this reason would elevate the dictates of a statute, i.e. the FTC Act limiting the FTC's jurisdiction, over the Constitution. This is contrary to basic principles of constitutional law. *Marbury v. Madison*, 5 U.S. 137, 177-8 (1803); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 829 (1995); *In re NVR L.P. et al.*, 206 B.R. 831, 839 (Bankr. D. Va. 1997) citing *Aguayo v. Christopher*, 865 F. Supp. 479, 487 (D. Ill. 1994):

> [O]ne of the oldest principles of constitutional law holds that the judiciary's powers are qualitatively different when a controversy requires a judge to interpret and give effect to the Constitution. Courts do not allow "statutory limitations" to block enforcement of the Constitution. (Citation omitted).

Id.

The majority decision has held that "any underinclusiveness that appellants have identified is not the result of the FTC attempting to favor one side of the public debate over another . . . [citation omitted]." Decision, App. 28a. This Court, however, has ruled that the application of restrictions solely to that charitable speech delivered through professionals "necessarily" discriminates against small or unpopular groups, *Riley*, 487 U.S. at 799, i.e. those most at need of Constitutional protection.

Congress is not without power to address this issue, but it can not be permitted to do so in a "necessarily" discriminatory way. This Court should issue a writ to address whether Congress can accomplish through two statutes what is forbidden using one statute.

A. Underinclusiveness is not Cured by the FTC's Lack of Jurisdiction over Charities.

The challenged provisions of the TSR affect only charities which use professional "telefunders" to deliver their appeals. Charities fundraising using individuals employed directly by them are not subject to the FTC's jurisdiction and therefore not subject to the challenged rules. The only difference being the payor on the caller's paycheck. Decision, App. 36a. The majority ruled that this underinclusiveness is permissible because it is based on the lack of jurisdiction by the FTC over charities rather than overt hostility to Appellants and others similarly situated. Decision, App. 26a-27a.

1. The Decision "necessarily" discriminates against small or unpopular charities in violation of this court's rulings.

This is in direct conflict with the Supreme Court's holdings that restrictions which apply only to appeals delivered by professionals are content-based and unconstitutional because they "necessarily" discriminate against small or unpopular

charities, and government may not evade the protections of the Constitution through indirect action. The Constitution protects speakers from both sophisticated and simple-minded infringements:

> As we have often noted, "'[c]onstitutional rights would be of little value if they could be . . . indirectly denied.'" *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

Thornton, 514 U.S. at 829.

In *Thornton*, the Supreme Court considered an Arkansas restriction on the number of terms an Arkansas representative could serve in the U.S. Congress. 514 U.S. at 783. The Court invalidated the restriction because the U.S. Constitution specifically states the required qualifications of representatives to Congress and does not provide for term limits. "In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly". *Id.* at 829, citing U.S. Const. Article I, § 3, cl. 3. Further, "statutory limitations" do not eclipse the protections of the Constitution. *In re NVR L.P.*, 206 B.R. at 839; *Aguayo*, 865 F. Supp. at 487. The *Aguayo* court specifically considered an underinclusive federal immigration law. *Id.* at 487. That scheme allowed aliens to seek citizenship only based on paternal citizenship. The plaintiff's mother was an American citizen, and the statute was therefore underinclusive. The Court held there was no legitimate reason to exclude or deny her citizenship. *Id.* at 491. The Court held the statute could not eclipse Constitutional equal protection guarantees against underinclusive laws:

> Quoting Justice Brandeis, the Heckler Court explained that "when the 'right invoked is that to equal treatment,'

> the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740.

Id. at 487.

Here, Congress is forbidden from passing a disclosure and other restrictions applicable solely to charities which use professional assistance because these restrictions are under-inclusive. *Riley*, 487 U.S. at 789-90, *Munson*, 476 U.S. at 966-967, and *Schaumburg*, 444 U.S. at 636-37. It can not indirectly accomplish this unconstitutional end, by design or not, by assigning enforcement to the FTC, an agency of limited jurisdiction.

Congress would not be without power to regulate these activities using the enforcement powers of the FTC and other agencies despite the arguments of the majority. Decision, App. 28a. The lack of jurisdiction over some entities, however, must relate to the purposes purportedly furthered by the restriction. *Discovery Network*, 507 U.S. at 426. This is not a matter of addressing a problem "one step at a time." Decision, App. 30a. Congress could easily have assigned enforcement of this rule to an agency of general jurisdiction or multiple agencies when it passed the PATRIOT Act.

The Supreme Court has been clear that prevention of fraud does not justify disclosure and other restrictions applicable to appeals delivered by professionals while exempting those delivered "in-house" by paid employees of charities. There is no "nexus" between whether or by whom a person is paid and whether the call is fraudulent. *Riley*, 487 U.S. at 789-90, *Munson*, 476 U.S. at 966-67, and *Schaumburg*, 444 U.S. at 636-37. Protection of privacy is not sufficient, either, as the FTC has not gathered any empirical evidence supporting the connection between the TSR and privacy nor is there any qualitative difference between an identically-scripted call delivered by a charity's employee versus a paid professional.

Unlike the FTC, the FCC held hearings, and concluded that Appellants' calls should not be regulated as commercial telemarketing:

> . . . calls made by a for-profit telemarketer hired to solicit the purchase of goods or services or donations on behalf of a tax-exempt non-profit organization are exempted from the rules on telephone solicitation. . . . *In light of the record before us*, the Commission believes that there has been no change in circumstances that warrant distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt non-profit organization from those made by the tax-exempt non-profit itself. The Commission recognizes that charitable and other non-profit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out its fundraising efforts.

68 Fed. Reg. 44144, 44160-61 (July 24, 2003) (emphasis added).

Charities, more than any other sector in our society, rely upon their goodwill to succeed. It would be counter productive for any charity engaged in a telemarketing grassroots campaign to ignore the bias which some consumers have against receiving unwanted telephone calls. In order to maintain a successful grassroots telemarketing campaign, charities and their telefunders long ago incorporated, on a voluntary basis, practices that would result in their calls being accepted rather than refused. In other instances, the laws of the various states require certain practices of telefunders that are separate and distinct from those required for other forms of telemarketing.

There is no legitimate distinction between Appellants and other charities. *Discovery Network*, 507 U.S. at 426. *Riley* held:

> it does not suffice to argue, . . . that [a] statute is valid because the fundraiser, not the charity, is the object of

> the regulation. Fining [a] fundraiser based upon its speech for the charity has an obvious and direct relation to the charity's speech.

Riley, 487 U.S. at 794.

Further, there are at least two examples of underinclusive application of the TSR which are not solely the result of lack of FTC jurisdiction over certain entities. These examples show the agency is trying to "favor one side of a public debate" through selective application of the TSR.

First, the FTC has admitted it does not intend to enforce the TSR's restrictions against political fundraising. It is not at all clear from the text of the regulation or the FTC's jurisdiction that political solicitations are exempt from the TSR, however the FTC has explicitly stated its intention to exempt this activity from the TSR as not "charitable in nature". 68 Fed. Reg. 4580, 4589 n.106 (Jan. 29, 2003). No matter if political fundraising is "charitable" or not, without question political fundraising, by an entity hired by a political party but within the jurisdiction of the FTC, constitutes a request for "any other thing of value" such that the TSR would apply but for the FTC's conscious effort to exclude this speech from TSR coverage. This is not a "neutral" exclusion and violates this Court's holding in *Discovery Network*. 507 U.S. at 429.

Second, the FTC has since issued a proposed revision to the TSR allowing prerecorded calls to consumers with whom the caller has an "established business relationship". Statement of Facts, *supra*, p. 9, ¶10. Thus, the FTC considers prerecorded calls by a charity, through a professional to prospective donors, to be "abandoned" but allows other charities to place prerecorded calls, through a professional, to past donors, if the call contains a certain disclosure. 69 Fed. Reg. at 67294. Without reference to the restriction itself, this action shows the FTC's application of the TSR is not "neutral" in its application but based on the FTC's opinion of the value of the speech or speaker in question.

2. This Court can not allow two statutes to achieve an unconstitutional end, which would be clearly banned if affected by a single law.

Thus the sole remaining justification used by the majority to allow the FTC to apply restrictions which "necessarily discriminate" against small or unpopular charities is the FTC's lack of jurisdiction over charities. Decision, App. 26a-27a. The majority bases this decision on the FTC Act and the PATRIOT Act. *Id.* at 27a. This is not constitutionally sufficient.

First, the protections of the Constitution can not be superseded by laws passed by Congress. It is the role of the independent judiciary to monitor the Acts of Congress to ensure compliance with the Constitution. "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." *Marbury*, 5 U.S. at 177-8. The dissent notes that constitutional protections would be of little value if Congress could evade them in two steps by creating an agency with limited jurisdiction then passing a law only enforced by that agency. Decision, App. 38a-39a. *Marbury* ruled that the Constitution is supreme, and contrary laws are void. 5 U.S. at 177-8. *Marbury* does not rule that the Constitution is supreme over any one law, but that two or more laws acting in concert cannot evade its protections.

The potential harm created by the Decision is described by the dissent. Decision, App. 39a-40a. In a simplistic example, should Congress wish to ban advertisements by banks, it could simply pass a general ban on all commercial advertising and assign enforcement to the FDIC. While it clearly would be unconstitutional for Congress to ban bank advertising alone based on underinclusiveness, and other arguments, the Decision would permit Congress to permanently avoid this protection through legislative device.

Second, the discriminatory effect of the TSR has no justification in the goals the FTC purportedly aimed to achieve. Congress was well-empowered to regulate fund-raising, in accordance with the Constitution, of course, by assigning jurisdiction to an agency of general jurisdiction or multiple agencies. Indeed, the dissent would concur with the majority absent this underinclusiveness. Decision, App. 34a. Government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Assigning enforcement of a regulation to an agency of limited jurisdiction is not the least restrictive means, as it infringes on the rights of those discriminated against, when Congress had power to do otherwise.

B. The Burdens Imposed by the Act are Substantial.

The Panel found that the regulations imposed by the Telemarketing Sales Rule on charitable calling are "modest restrictions on speech—particularly compared to the ones invalidated in *Schaumburg*, *Munson*, and *Riley* . . ." Decision, App. 15a. The Decision therefore conflicts with the Supreme Court which has held that the disparate impact of these restrictions makes them substantial burdens on protected speech. Appellants argued that the following five restrictions constituted an unequal and substantial burden:

1. Prohibition of "abandoned calls". 16 C.F.R. § 310.4(b)(1)(iv), App. 101a.

2. A curfew provision between 8:00 a.m. and 9:00 p.m. 16 C.F.R. § 310.4(c), App. 103a.

3. The entity specific "do-not-call" list. 16 C.F.R. § 310.4(b)(1)(iii)(A), App. 100a.

4. Transmission of caller ID information. 16 C.F.R. § 310.4(a)(7), App. 99a.

5. Disclosure provision requiring a prompt explanation that the caller is seeking donations on behalf of a specific charity. 16 C.F.R. § 310.4(e), App. 104a.

Simply because these restrictions are not identical to those set forth in *Riley*, *Munson* and *Schaumburg*, does not mean that as a whole they do not constitute a "substantial" burden on Appellants' speech. The cumulative effect is to make the appeals of some charities seem less legitimate than others based solely on the employment status of the caller. This effect, i.e. to be made to appear "less worthy" in donors' eyes, is a substantial effect on speech. Appellants' affidavits showed the increased cost of fundraising created by these restrictions, costs which are not incurred by charities delivering identical messages through their own employees.

It is well-settled that the First Amendment protects a speaker's decision of what to say, how to say it, when to say it, and when to remain silent. *Riley*, 487 U.S. at 795; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Supreme Court has also stated that the government has the ability to regulate the content of protected speech only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications*, 492 U.S. at 126.

The disclosure requirement at issue here is similar in effect to that invalidated by *Riley* which considered a state law requiring a fundraiser to disclose the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the state within the previous 12 months. 487 U.S. at 786. The Court rejected this disclosure because an identical message delivered by an employee of a charity was exempt with "the predictable result is that professional fundraisers will be encouraged to quit [fundraising] . . ." *Id.* at 800. When a telephone call has a matter of seconds to succeed or fail, *Id.* at

800, an interruption to deliver any forced speech is a substantial burden.

Appellants' speech is substantially burdened by these requirements, considered as a whole, because they disrupt Appellants' speech and not identical speech delivered by exempt entities. The Decision conflicts with the Supreme Court on this issue.

C. The Decision was Incorrect Because the FTC's Restrictions are Unrelated to Prevention of Fraud.

Finally, the Decision conflicted with three Supreme Court decisions when it accepted the FTC's assertion that the TSR was justified because it was related to the prevention of fraud. Decision, App. 17a-19a.

The dissenting opinion points out that the FTC admitted at oral argument that "there is 'no empirical evidence' in the record to support this assumption." Decision, App. 36a. In fact, the Decision conflicts with *Riley*, 487 U.S. at 789-90, *Munson*, 476 U.S. at 966-67, and *Schaumburg*, 444 U.S. at 636-37, which all ruled that there is no connection between whether a person is paid to help a charity deliver its appeal and whether that appeal is fraudulent or not and that it is improper to rely on this justification to support a finding that the TSR is narrowly drawn.

Several examples demonstrate that there is no reasonable, rational or other connection between the TSR's restrictions and protection of residential privacy. A call made by a telefunder hired by the American Red Cross may come during the dinner hour and disturb the tranquility of the home. This call, however, is in compliance with the rules if the call contains no actual request for a contribution. The same call, at the same time, by the same individual, with the same content that ends with a request for a contribution, is restricted. There is no distinction that justifies the separate

treatment. Taking this example further, if the second call had been made by an employee of the Red Cross, then regardless of how much the consumer's privacy was disturbed, the call would not be subject to the TSR restrictions.

These issues show the Decision violates the Supreme Court's holding in *Discovery Network*, 507 U.S. at 426. The challenged regulation is a prophylactic measure and is not the least restrictive means to prevent fraud or protect privacy and the Decision therefore conflicts with established Supreme Court precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 25, 2005]

No. 04-1378
CA-03-963-JFM

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INCORPORATED,
Plaintiffs-Appellants,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Traxler, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1378

NATIONAL FEDERATION OF THE BLIND; SPECIAL OLYMPICS MARYLAND, INCORPORATED,
Plaintiffs-Appellants,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-03-963-JFM)

Argued: December 1, 2004
Decided: August 26, 2005

OPINION

Before WILKINSON, TRAXLER, and DUNCAN, *Circuit Judges.*

WILKINSON, *Circuit Judge*:

This case presents a challenge to the Federal Trade Commission's regulation restricting telemarketing practices as they apply to charitable fundraising. The regulation requires callers to make certain disclosures, refrain from making late-night, early-morning, and "abandoned calls" (calls followed

by silence), and comply with a charity-specific "do-not-call list." Since the FTC has no jurisdiction over non-profit organizations, the new rule does not apply to calls made by "in house" charity staff or volunteers. It does, however, apply to "telefunders"—that is, professional fundraisers from for-profit companies who solicit donations on behalf of charities. The appellants, two charities who contract with these companies, argue that the regulation is beyond the FTC's authority and violates the First Amendment.

We think Congress clearly authorized the FTC to promulgate this new rule. Because we are further convinced that it constitutes a "reasonable regulation," that is, "narrowly drawn" to serve a "sufficiently strong subordinating interest that the [government] is entitled to protect," we find it to be constitutional. *Sec. of State of Maryland v. Munson*, 467 U.S. 947, 960-961 (1984) (quotation omitted). The regulation preserves the important right of charities to make telephone solicitations. To strike down the rule, however, would disable the democratic branches from taking even the most modest steps necessary to protect the home environment from intrusive phone calls.

I.

In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"). Pub. L. No. 103-297, 108 Stat. 1545 (codified as amended at 15 U.S.C. §§ 601 et seq. (2000)). That legislation instructed the FTC to "prescribe rules prohibiting deceptive . . . and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1) (2000). Specifically, Congress directed the FTC to forbid "unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," to restrict "the hours of the day and night when unsolicited telephone calls can be made," and to require that callers disclose information about the nature and purpose of the call. Id. § 6102(a)(3).

Two further provisions of the 1994 Telemarketing Act are particularly relevant to this case. First, Congress defined "telemarketing" to only cover calls "conducted to induce purchases of goods or services." *Id.* § 6106(4). Phone calls seeking charitable donations were thus outside the scope of the Telemarketing Act as it existed in 1994.

Second, Congress explained that the Telemarketing Act did nothing to affect activity beyond the FTC's jurisdiction. *Id.* § 6105(a). In this regard, Congress cross-referenced the jurisdictional provisions of the Federal Trade Commission Act ("FTCA"). The FTCA gives the FTC jurisdiction over "persons, partnerships, or corporations," with some exceptions not relevant here. *Id.* § 45(a)(2). An entity is only a "corporation," for FTCA purposes, if it is "organized to carry on business for its own profit or that of its members." *Id.* § 44. Thus, according to the FTC's organic statute, non-profit organizations fall outside the scope of the agency's jurisdiction. And, as Congress made clear, the Telemarketing Act did nothing to change that fact. *Id.* § 6105(a).

In 1995, the FTC implemented Congress' directives by promulgating the original Telemarketing Sales Rule ("TSR"). 16 C.F.R. § 310 et seq. (1995). The TSR imposed several restrictions on telemarketers—requiring them, inter alia, to make certain disclosures, obey time restrictions, and refrain from calling consumers who have asked not to be called by that particular seller. Before the 1995 TSR became effective, the FTC issued an advisory statement clarifying that the TSR did not regulate professional telemarketers calling on behalf of non-profit organizations (these professionals are often referred to as "telefunders"). The agency justified this decision by explaining that soliciting donations did not qualify as "telemarketing" under the Telemarketing Act.

Following new congressional instructions, however, the FTC's position towards telefunders has changed. In October 2001, Congress enacted the USA PATRIOT Act, which

contained a section (section 1011) entitled "Crimes Against Charitable Americans." Pub. L. No. 107-56, 115 Stat. 396 (2001).

This section amended the Telemarketing Act in three significant ways. First, Congress inserted the phrase "fraudulent charitable solicitations" in its general description of what "deceptive telemarketing acts or practices" the FTC should regulate. 15 U.S.C.A. § 6102(a)(2) (West Supp. 2004). Second, Congress added a new subsection specifically directing the FTC to include:

> a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate. . . .

Id. § 6102(a)(3)(D). And third, Congress altered the Act's definition of "telemarketing" to include a reference to charitable solicitations.[1] *Id.* § 6106(4).

One crucial part of the Telemarketing Act, however, remained unchanged by the PATRIOT Act. The PATRIOT Act did not purport to alter the FTC's jurisdiction, which is still governed by the jurisdictional provisions in the FTCA. As explained above, those provisions do not cover non-profit organizations. The PATRIOT Act, therefore, expanded what "*acts and practices*" could be regulated by the FTC under the Telemarketing Act, but it did not change what *type of entity* was subject to the FTC's control.

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[1] "Telemarketing" is now defined in the Act to be "a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call." *Id.*

In January 2002, the FTC issued a notice of proposed rulemaking to adjust the TSR after the changes Congress had made to the Telemarketing Act. It received approximately 64,000 comments, some calling for more regulation and some asking for less. It then conducted a three-day public forum. In reviewing the feedback it received, the FTC concluded that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." 68 Fed. Reg. 4637.

On January 29, 2003, the FTC promulgated a new TSR. 68 Fed. Reg. 4580 (Jan. 29, 2003) (codified at 16 C.F.R. § 310 (2005)). Attempting to formulate this new rule in accordance with Congress' directions, the FTC faced a quandary. Congress had not altered the jurisdictional provisions in the Telemarketing Act, thus leaving the FTC without jurisdiction over non-profit organizations. But, at the same time, Congress did amend the definition of "telemarketing" to cover charitable solicitations. To reconcile those two congressional mandates, the agency articulated the distinction which is now being challenged. It stated:

> Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.

Id. at 4585. Thus, professional telefunders calling on behalf of charities are subject to the new TSR, while "in house" callers from the charities themselves are not. It is this distinction that lies at the heart of the instant dispute.

The new TSR imposed several new restrictions on telemarketers generally, but only some of those restrictions apply to telefunders. Five such provisions are being challenged here:

> (1) prohibitions on placing calls before 8:00 a.m. or after 9:00 p.m., 16 C.F.R. § 310.4(c);
>
> (2) prohibitions on "abandoned calls" (a call is abandoned when a person at home answers the phone and is not connected to a telemarketer within two seconds), 16 C.F.R. § 310.4(b)(1)(iv);
>
> (3) a requirement that callers promptly explain that they are seeking donations, and identify the charity on behalf of which the request is being made, 16 C.F.R. § 310.4(e);
>
> (4) a requirement that telemarketers transmit their name and phone number to caller identification services ("caller ID"), 16 C.F.R. § 310.4(a)(7); and
>
> (5) an obligation that telemarketers refrain from calling a person who has previously asked not to be called by a specific charity, 16 C.F.R. § 310.4(b)(1)(iii)(A).

Similar to this last restriction, the TSR also included a national donot-call registry (one that is not entity-specific) which telemarketers are required to respect. However, the rule does not require that telefunders adhere to the national do-not-call list—instead requiring only their adherence to a more modest charity-specific list. 16 C.F.R. § 310.6(a).

Appellants National Federation of the Blind and Special Olympics Maryland, Inc. ("the charities") are nonprofit organizations that qualify for tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Both charities require donations to carry out their important work. To solicit donations, these charities rely on professional telefunders. Because the telefunders are restricted by the new TSR, the

charities say that their fund-raising efforts have been adversely affected.

The two charities filed suit against the FTC in the United States District Court for the District of Maryland. They challenged the amended TSR on the grounds that the rule exceeded the statutory authority of the FTC and, in the alternative, violated the First and Fourteenth Amendments to the Constitution.

Both parties filed cross-motions for summary judgment, and on February 24, 2004, the district court entered judgment for the FTC. *Nat'l Fed. of the Blind v. FTC*, 303 F. Supp. 2d 707 (D. Md. 2004). The charities now appeal. We review these questions of law de novo. *United States v. Deaton*, 332 F.3d 698, 703-04 (4th Cir. 2003).

II.

The charities first claim that the new TSR is beyond the FTC's statutory authority. Plaintiffs contend that when Congress amended the Telemarketing Act in 2001 it only intended for the FTC to regulate *fraudulent* charitable solicitations, not calls made in the normal course of charitable fundraising. According to the charities, since time restrictions and prohibitions on abandoned calls, for instance, are not rules aimed at preventing fraud, they are beyond the agency's statutory mandate.

When an agency's construction of a statute is challenged, we turn to the familiar framework set forth in *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Chevron instructs that we first review the statute to see if the intent of Congress is clear. If Congress has not answered the question at hand, then we defer to the agency's interpretation of the statute, so long as it is a reasonable one. *Id. See also Sigma-Tau Pharm. Inc. v. Schwetz*, 288 F.3d 141, 144 (4th Cir. 2002).

Here, we need not go past the first step. For it is appropriate to "apply canons of statutory construction at step one of the *Chevron* inquiry." *E.E.O.C. v. Seafarers Int'l Union*, 394 F.3d 197, 203 (4th Cir. 2005). And a traditional canon of statutory interpretation leads us to conclude that Congress has answered the current question. It is well-established that:

> Congress is presumed to enact legislation with knowledge of the law. The upshot of this canon of statutory interpretation is that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law.

In re Witt, 113 F.3d 508, 513 (4th Cir. 1997) (internal citations and quotations omitted). *See also United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995).

As the district court noted, the 1994 Telemarketing Act instructed the FTC to regulate telemarketers *both* to prevent fraud *and* to protect the privacy of the home. Not surprisingly, the original TSR addressed both concerns—promulgating regulations which included time restrictions (to protect privacy) and disclosure requirements (to prevent fraud).

Congress amended the Telemarketing Act in 2001 to include charitable solicitations, but it did not enact a full-scale overhaul of the statute and suddenly render abusive or intrusive calls beyond the FTC's purview. Thus, when Congress altered the Act's definition of "telemarketing" to encompass calls soliciting charitable donations, it surely knew that it was making those calls subject to the same restrictions that other telemarketing calls were subject to under the original version of the Act. If Congress had intended the opposite result, it would have said so. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter

that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (internal quotation omitted).

The charities point to the fact that when Section 1101 of the PATRIOT Act was passed, Senator Mitch McConnell expressed the hope that it would target fraudulent charities who were preying on sympathetic Americans following the attacks of September 11, 2001. *See* 104 Cong. Rec. S10059, 10065 (Oct. 2, 2001). While this is true, it does not change the plain text of the statute. The PATRIOT Act expanded the definition of "telemarketing" to include "a charitable contribution, donation, or gift of money or any other thing of value." 15 U.S.C.A. § 6106(4) (West Supp. 2004). This is a general reference to charitable solicitations. Nothing in the definition suggests that only fraudulent charitable calls are proper subjects for regulation, or that abusive or intrusive solicitations are exempt from regulation.

In addition, the charities point to the amendment that changes the preamble to the Telemarketing Act. Currently the general directive to the FTC reads:

> The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices *which shall include fraudulent charitable solicitations*, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing.

Id. § 6102(a)(2) (emphasis added to indicate the new language). This language is not exhaustive; it merely explains that the FTC "shall include," among others, regulations to target fraudulent charitable solicitations. Any confusion regarding the scope of this directive is clarified by the more technical section of the Act which defines the relevant terms. The definition of "telemarketing," as explained above, was amended to include calls for "charitable contribution[s]" gen-

erally, and does not limit the Act's coverage to only those calls which are likely to be fraudulent. *Id.* § 6106(4).

We therefore conclude that Congress intended for all conduct now encompassed under the broadened definition of "telemarketing" to be subject to FTC regulations passed for the purpose of preventing fraud and protecting the home. The FTC enacted the TSR pursuant to these directions, and we find it was well within its statutory authority to do so.

III.

We thus turn to the plaintiffs' claim that the TSR violates the First Amendment. Three Supreme Court cases address First Amendment challenges to regulations on professional charitable fundraising. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Sec. of State of Maryland v. Joseph Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988).

From this trilogy we learn that "charitable solicitations" have "not been dealt with as purely commercial speech." *Riley*, 487 U.S. at 788. This is so because they "involve a variety of speech interests that are within the protection of the First Amendment." *Id.* (quotation omitted). We also know, however, that the protection accorded to charitable solicitations is not absolute. For "[s]oliciting financial support is undoubtedly subject to reasonable regulation" so long as the regulation is "undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech." *Schaumburg*, 444 U.S. at 632.

Thus a balance must be struck. A regulation will be sustained if (1) it "serves a sufficiently strong, subordinating interest that the [government] is entitled to protect" and (2) it is "narrowly drawn . . . to serve the interest without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 960-61 (quoting *Schaumburg*, 444 U.S.

at 636-37). We hold that the FTC's new rule meets these two requirements.[2]

IV.

The FTC has identified two government interests that the TSR was designed to advance—the prevention of fraud and the protection of privacy in the home. Our initial task is to ask whether these interests qualify as "sufficiently strong, subordinating interest[s] that the [government] is entitled to protect." *Munson*, 467 U.S. at 960-61 (quoting *Schaumburg*, 444 U.S. at 636). For the following reasons, we conclude they do.

A.

First, we address the FTC's desire to protect consumers from fraud. At least one of the challenged regulations—the requirement that solicitors promptly disclose the nature and purpose of their call—aims to prevent fraud.

Our evaluation of this proffered government interest is not difficult. For although the Court in *Schaumburg*, *Munson*, and *Riley* ultimately concluded that the specific restrictions in each case were not narrowly tailored to prevent fraud, it was beyond dispute in all three cases that "[t]he interest in

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[2] It is unclear whether this standard amounts to "strict scrutiny" (as the charities allege) or to the less stringent "intermediate scrutiny" (as the FTC urges). The district court believed it was applying intermediate scrutiny since the present regulations were reminiscent of ones upheld as time, place, and manner restrictions. *See Nat'l Fed. of the Blind of Arkansas v. Pryor*, 258 F.3d 851, 855 (8th Cir. 2001) ("The *Munson / Village of Schaumburg* standard and the time-place-and-manner standard are obviously very similar."); *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (holding that content-neutral regulations of charitable solicitations are subject to "an intermediate level of scrutiny").

Regardless of the label, the substance of the test is clear. And the TSR passes it because it is "narrowly drawn" to serve a "sufficiently strong subordinating interest." *Munson*, 467 U.S. at 960-61 (quotation omitted).

protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley*, 487 U.S. at 792. *See also Munson*, 467 U.S. at 961; *Schaumburg*, 444 U.S. at 836.

B.

The FTC defends its other regulations on the basis of an interest that the Court in *Schaumburg*, *Munson*, and *Riley* did not address—namely, an interest in safeguarding residential privacy.[3] *See Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619-20 (2003) (characterizing laws invalidated in *Schaumburg*, *Munson*, and *Riley* as ones involving fraud prevention). The goal behind the time restraints, for example, is not to prevent fraud, but to allow family life to proceed undisturbed by phone calls in the evening and early morning hours.

It is hard to argue, as plaintiffs must, that the protection of residential privacy does not qualify as a "sufficiently strong subordinating interest that the [government] is entitled to protect." *Munson*, 467 U.S. at 960-61 (quotation omitted). For the Supreme Court has explained that "'[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

Indeed, the Court's First Amendment jurisprudence has long "recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an

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[3] Although preventing "undue annoyance" was mentioned as a potential state interest in the *Schaumburg* case, 444 U.S. at 636, the Court subsequently explained that the "primary interest" proffered in *Schaumburg* was actually an interest "in preventing fraud." Munson, 467 U.S. at 961. *See also Riley*, 487 U.S. at 788.

important value.'" *Id.* (quoting *Carey*, 447 U.S. at 471). From this principle, it follows that:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different.
>
> . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. (internal citations omitted). *See also Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("That we are often captives outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.")

The significance that the Court places on residential privacy should not be surprising. Protecting the sanctity of the family environment is important enough to actually serve as the basis for a constitutional right in many different contexts. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 31 (2001) (right to be secure from warrantless search in one's home); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (right to read material of choice in one's home).

Admittedly, these cases guard against intrusions by a state agent, as opposed to the private interruptions in the present case. But if protecting the home is something that serves as the basis for a constitutional right, then it surely must also serve as a substantial government interest that the democratic process is entitled to protect. Or, put differently, if the state is constrained from breaching the sanctity of the home en-

vironment, then the state is allowed to protect what it cannot casually breach. A contrary conclusion would turn the Constitution into a house divided—a document at war within itself. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (a proffered government interest in regulating speech is more compelling when the interest itself is the basis of a constitutional right).

In short, the judicial branch and the democratic branches of our government are hardly compelled to work at cross-purposes. And the democratic process is not compelled to leave families prey to unwanted solicitations and hang-ups at all hours and against their wishes. We are thus convinced that the FTC's second proffered justification for the TSR constitutes a "sufficiently strong subordinating interest that the [government] is entitled to protect." *Munson*, 467 U.S. at 960-61 (quotation omitted).[4]

V.

Our next inquiry is whether the challenged provisions of the TSR are "narrowly drawn . . . to serve the interest[s] without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 961 (quotation omitted). Because these regulations are modest restrictions on speech—particularly compared to the ones invalidated in *Schaumburg*,

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[4] Like the district court, we find no merit to plaintiffs' argument that the FTC cannot assert an interest in protecting residential privacy because people do not generally feel imposed on by charitable solicitations. The agency explicitly rejected this possibility, relying on the fact that it received relatively few answers in response to a survey question asking whether charitable fundraisers and commercial telemarketers should be treated differently. 68 Fed. Reg. at 4637 n.685. We think the agency's interpretation of the record is a reasonable one. As the district court explained, "[i]ndeed, if more people distinguished charitable and commercial calls with respect to the privacy intrusion involved, they presumably would have responded to the question." *Nat'l Fed. of Blind*, 303 F. Supp. 2d at 720 n.11.

Munson, and *Riley*—and because they are not impermissibly "underinclusive," we find that they satisfy the requirement that they be narrowly tailored.

A.

The charities argue that the five provisions of the TSR challenged here are substantial burdens on speech. The FTC claims them to be only minor restrictions that actually permit a significant amount of speech to occur. We shall take up the provisions in turn.

First, we address the prohibition of "abandoned calls." 16 C.F.R. § 310.4(b)(1)(iv). A call "is 'abandoned' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting." *Id.* To label this restriction a restraint of speech at all is a generous characterization. For "abandoned calls," by definition, involve no *speech*—they leave the recipient of the call frustrated by *silence* on the other end of the line. A perfectly reasonable person can find silence or repeated silences at the other end of a phone unnerving. Particularly if one is elderly or lives alone, such silences can stoke fears and be unsettling. We think this restriction on speech (if one can call it that) is modest at best and is surely narrowly tailored to protect "the sanctity of the home." *Frisby*, 487 U.S. at 484 (quotation omitted).

Second, the charities challenge the time restriction provision of the TSR which prohibits solicitors from placing calls before 8:00 a.m. or after 9:00 p.m. *See* 16 C.F.R. § 310.4(c). We note that this rule leaves a significant amount of time—13 hours a day—when calls are permitted. In fact, the window for permissible calling includes the dinner hour, a time when families are quite likely to be home. At bottom, what the plaintiffs seek is a constitutional right for telefunders to call a

potential donor even in the wee hours of the morning. Merely to state such a proposition is to acknowledge its untenability.

Indeed, these regulations are narrowly drawn to protect only the most private aspects of a family's time. After 9:00 p.m., family members might, for example, be cleaning house for the night, bathing, paying bills, discussing homework, planning this or that, reading, watching TV, or simply getting ready to turn in. Before 8:00 a.m., they might be eating breakfast, dressing, shaving, or fixing lunch for spouses or kids. The First Amendment does not require us to interrupt these family moments, and the only burdens on speech imposed by the TSR time restrictions protect just the most personal hours of a family's day.

Third, the charities take issue with the entity-specific "do not call list." This regulation forbids telefunders from calling a person on behalf of a specific charity when the recipient has previously requested not to be called by that charity. 16 C.F.R. § 310.4(b)(1)(iii)(A). Telefunders are not, however, subject to the more restrictive national "do not call list" which forbids calls to people who have put their names on a general nation-wide opt-out registry. That provision (which commercial telemarketers must obey) was recently upheld by the Tenth Circuit in *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir.), *cert. denied*, 125 S. Ct. 47 (2004). In addressing the "narrowly tailored" question, the Tenth Circuit remarked:

> [T]he national do-not-call registry is narrowly tailored because it does not over-regulate speech; rather, it restricts only calls that are targeted at unwilling recipients. Cf. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("There simply is no right to force speech into the home of an unwilling listener.") . . .
>
> . . . The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e. an opt-in fea-

> ture) are less restrictive than laws that prohibit speech directly.

Id. at 1242.

We are persuaded by the Tenth Circuit's reasoning in *Mainstream Marketing*, and we likewise agree with the analogy it drew to *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970). In *Rowan*, the Court upheld a law permitting a resident to stop companies from mailing advertisements that the resident believed to be provocative. *Id.* at 729-30. The Court emphasized that this speech restraint was based on a private actor's choice. It explained that "Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Id.* at 738.

The parallels between the law at issue in *Rowan* and the do-not-call list in this case are unmistakable. If consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace. In this way, a do-notcall list is more narrowly tailored to protecting privacy than was the law in *Rowan*.

Moreover, this particular restriction seems even more reasonable given the fact that the FTC has only subjected telefunders to a charity-specific list. Under this procedure, a consumer cannot report to a central authority that he wishes not to be called by any telemarketers generally; he must instead repeat his request as to each caller individually. This charity-specific alternative to a national list is an option that the *Mainstream Marketing* court called "extremely burdensome to consumers." 358 F.3d at 1244. In light of this, we have no trouble finding the charity-specific restriction on speech to be a permissibly narrow means of protecting the home environment.

Fourth, the charities challenge the TSR provision requiring telefunders to transmit their name and phone number to caller ID services. 16 C.F.R. § 310.(a)(7). This minimal restriction simply allows consumers to screen and ignore telemarketing calls that come at a bad time. Like the do-not-call list, this provision is narrowly tailored to protect privacy because it only "effectively block[s] . . . the calls that cause the problems the government [seeks] to redress." *Mainstream Marketing*, 358 F.3d at 1238. Just as a peep-hole in a door allows residents to pre-select whom they wish to welcome into their homes, so caller ID information allows residents to pre-select whom they wish to speak to on a particular evening. This rule does not stop a telefunder from calling, nor does it prevent a potential donor from answering the phone when it is convenient. It merely gives families a tool specifically designed to protect their private time, and it is thus narrowly tailored to serve that government interest.

Fifth and finally, the charities object to the disclosure provision of the TSR which requires telefunders to promptly explain that they are seeking donations on behalf of a specific charity. 16 C.F.R. § 310.4(e). We can easily reject this challenge because the Supreme Court has implicitly rejected it already. In *Riley* itself, the Court held that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." 487 U.S. at 799 n.11. If the First Amendment permits an obligation for a telefunder to disclose his professional status, then surely it also permits the present modest disclosure requirement—only to state the name of the charity and the purpose of the call.

In reviewing these rules, we have no wish to exaggerate. Not every home is a "peaceable kingdom." And it is not the end of the world when a family receives an abandoned call

or a late night call that interrupts its evening. But it is one more small strain that families already stressed by twenty-first century life are forced to endure. Our Constitution does not require that we add to family burdens by forbidding even the most reasonable and minor restrictions on telemarketing practices.

B.

Notwithstanding plaintiffs' arguments to the contrary, these five FTC regulations are very different from the ones at issue in *Riley, Munson*, and *Schaumburg*. Those three cases, as the Supreme Court has subsequently explained, considered "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level." *Madigan*, 538 U.S. at 612 (2003). The restrictions at issue in this case are, quite frankly, horses of a different color.

In *Schaumburg*, a local community passed an ordinance requiring every person intending to solicit charitable donations to apply for a permit. 444 U.S. at 623-24. A permit would issue only if an application contained "satisfactory proof that at least seventy-five percent of the proceeds of such solicitations [would] be used directly for the charitable purpose of the organization." *Id.* at 624. The Supreme Court found the law to be unconstitutional because it could not find "any substantial relationship between the 75-percent requirement" and an interest in preventing fraud or protecting privacy. *Id.* at 638.

Clearly, the law in *Schaumburg* is very different from the regulation in the present case. First, the TSR does not involve an application for a license, which is a prior restraint typically disfavored in First Amendment cases. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). Moreover, while the blunt and broad 75% rule was not narrowly tailored to either prevent fraud or to protect

privacy, the regulations here (as demonstrated above) are carefully crafted for precisely those purposes. Four of the challenged restrictions were designed specifically to weed out unwanted and invasive calls. Indeed, the caller ID and do-not-call list provisions actually place the decision of specifying just which speech is restricted with the consumer, not with the government. Meanwhile, the fifth requirement—the disclosure provision—seeks to prevent fraud by requiring telefunders to be forthright about their reason for calling.

The state statute struck down in *Munson* is also a far cry from the FTC's regulation here. In *Munson*, the state of Maryland passed a law similar to the one at issue in *Schaumburg*, but with a slightly more flexible twist. 467 U.S. at 950-51. The law prohibited charities from paying professional fundraisers more than 25% of the amount they raised, but permitted a waiver of this rule if the restriction "would effectively prevent the charitable organization from raising contributions." Id. The Court was not persuaded that the waiver saved the regulation. It found, as in *Schaumburg*, that fraud could be prevented by "measures less intrusive than a direct prohibition on solicitation." *Id.* at 961.

Unlike the *Schaumburg* and *Munson* statutes, the TSR does not impose "a direct prohibition on solicitation." *Id.* It does not set up a flat percentage limitation on how much commission a professional fundraiser can take home. Rather, it merely restrains when and how a call can be made and it does so largely in an effort to protect consumer privacy. The difference between a flat prohibition of the sort condemned in *Schaumburg* and *Munson* and the regulations here is a difference of kind, not simply one of degree.

Finally, plaintiffs place heavy reliance on the third case of this trilogy, *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988). The statute in Riley directly regulated telefunders in three different ways. First, it prohibited the professional fundraisers from collecting "unreasonable or excessive" fees.

Those terms were defined by a three-tiered schedule, assigning different standards depending on what percentage commission the telefunders collected. *Id.* at 784-85. Second, the law required telefunders to disclose to donors the percentage of revenue the telefunder had retained from the charity over the past twelve months. *Id.* at 786. And third, it required telefunders to obtain a license before engaging in solicitation, while volunteer fundraisers encountered no such hurdle. *Id.* at 786-87.

As an initial matter, we reemphasize that the North Carolina law in *Riley* was not seeking to protect consumer privacy, but was rather "[r]esponding to a study" that indicated a growing trend of large commissions being charged by charity telefunders. *Id.* at 784. The Supreme Court was candid that an interest in keeping donors informed about how their charitable dollars are spent "is not as weighty as the State asserts." *Id.* at 798. *Riley* did not consider how restraints on charitable solicitations might further domestic privacy—a concern to which the Court has attached particular significance—and a concern that clearly motivated the agency here. It is thus difficult to compare *Riley* to the present case because, since the proffered state interests are not the same, the "narrowly tailored" analysis will necessarily differ.

Nonetheless, we note other significant differences between the TSR and the prohibitions in the North Carolina statute. Indeed, the regulations in *Riley* were far more restrictive than the ones before us today. The FTC has not asked the telefunders to obtain a license here, particularly not by a licensing procedure that could permit "a delay without limit." *Id.* at 802. Further, the TSR disclosure requirement—designed only to identify quickly the nature and purpose of the call—is much more modest than an obligation to reveal how much one is being paid for the call. *Id.* at 786. Not only does the latter requirement compel more speech, but it also

adversely affects how receptive a listener will be to the remainder of what is said.

Finally, the TSR does not use a rough "percentage-based measure" to determine whether a telefunder's fee is reasonable or not. *Id.* at 793. Indeed, no limitation is placed on the amount of the telefunder's fee at all. Telefunders must comply, of course, with rules governing the manner in which they may call potential donors. But in this regard, they are no different from all other telmarketing companies regulated by the FTC. And the restraints that the FTC requires—by rationing calls rather than by prohibiting speech—are markedly different from the unconstitutional restraints in *Riley*. The *Riley* Court itself noted that "more benign and narrowly tailored options are available." *Id.* at 800. The FTC's new rule provides an example of just such an option.

C.

We thus find the TSR restrictions to be modest, reasonable, and quite different from the laws invalidated in the three main Supreme Court cases governing this field. The plaintiffs make an additional argument, however, for why the TSR is not "narrowly drawn" to serve the two government interests at stake. *Munson*, 467 U.S. at 961. Their argument rests on an allegedly impermissible dichotomy between the way the FTC treats professional fundraisers and the way it treats in-house charity callers. As we have noted, the challenged restrictions apply to the former, but not the latter—adversely affecting those charities that choose to out-source their fundraising work. According to the plaintiffs, this distinction makes the TSR unconstitutionally "underinclusive."

A law is underinclusive in this sense, and thus not narrowly tailored, when it discriminates against some speakers but not others without a legitimate "neutral justification" for doing so. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993). Even when the government has a compelling interest for restricting speech, it may not seek to

further that interest by creating arbitrary distinctions among speakers that bear no "reasonable fit" to the interest at hand. *Id.* at 416-47. Thus, in *Discovery Network*, the government was prevented from advancing an interest in street aesthetics by banning only newsracks containing commercial handbills, but not other publications. *Id.* at 425-26. The Court remarked that all news-racks are "equally unattractive" and it found suspicious the fact that the city's selective ban only eliminated 62 of the nearly 2000 racks. *Id.* at 418, 425. Put simply, as *Discovery Network* illustrates, a regulation can violate the First Amendment by restricting too little speech, as well as too much.

The concept of underinclusiveness needs to be approached with some caution, however. Holding an underinclusive classification to violate the First Amendment can chase government into overbroad restraints of speech. Thus, a speech restriction with a limited reach is not doomed to fail First Amendment scrutiny. *See Burson*, 504 U.S. at 207 ("We do not . . . agree that the failure to regulate all speech renders the statute fatally underinclusive.") What concerned the Court in *Discovery Network* was not, as the plaintiffs would have it, simply the fact that some speakers were restrained where others were not. Rather, the Court invalidated the ordinance because there was "no justification for that [distinction] other than the city's naked assertion that commercial speech has 'low value.'" *Id.* at 429.

There are other cases, by contrast, where an underinclusive speech restriction is justified by a neutral and legitimate reason for the distinction. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, for example, a city ordinance banned signposts only on public but not private property. 466 U.S. 789, 811 (1984). Although obviously underinclusive, the distinction was neutrally justified by a "private citizen's interest in controlling the use of his own property." *Id.*

As the district court in the present case noted, the Supreme Court has found an underinclusive restriction of speech to be impermissible in three circumstances: (1) where the law represents an attempt by the government to give one side of a public debate an advantage over another, *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); (2) where the regulation is so broad or narrow in scope that it "undermines the likelihood of a genuine governmental interest," *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) (citation omitted); and (3) where the underinclusiveness is so severe that it "raises serious doubts" about whether the government is actually serving the interests it invokes. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *see also Discovery Network*, 507 U.S. at 424-26.[5]

Significantly, in all three scenarios the limited scope of the regulation served as a red flag to signal a governmental trespass on a fundamental First Amendment concern. A distinction among speakers is thus not objectionable per se, but only because it renders implausible the government's claim that the regulation making this distinction is narrowly tailored to address a certain interest. The *City of Ladue* Court, for instance, was troubled by the distinction in that case

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[5] The dissent reads *Riley* to create yet another category, one that would require "a compelling justification" for "regulations that distinguish between charities." Dissenting Op. at 30. But *Riley* cannot bear the weight that the dissent would place upon it. The "key deficiency" of the North Carolina statute was not, as the dissent would have it, the fact that "it necessarily only applied to those charities that used professional fundraisers." *Id.* at 30. Rather, the problem was that the provision could not withstand "exacting First Amendment scrutiny" because the state's interest was insufficiently "weighty" and "the means chosen to accomplish it [were] unduly burdensome and not narrowly tailored." *Riley*, 487 U.S. at 798. As we have noted, the *Riley* Court emphasized that imposing requirements upon professional fundraisers does not offend the First Amendment so long as those requirements are sufficiently narrowly tailored, *id.* at 799 n.11, as the restrictions in this case are.

because it "diminish[ed] the credibility of the government's rationale for restricting speech." 512 U.S. at 51. Similarly, the *Discovery Network* Court did not invalidate the ordinance simply because it applied to some newsracks and not to others, but rather because the selective application of the ban left the city relying on the notion that commercial handbills were "low value," a characterization that the Court was "unwilling" to countenance. 507 U.S. at 428. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) (framing the underinclusiveness question by asking whether "the city denigrates its interest . . . and defeats its own case by permitting" some speech and not others).

There is no mystery, however, about why the FTC has distinguished telefunders from in-house charity callers. Indeed, the agency candidly explained that it drew this line because that was the only way to reconcile the new instructions from Congress set forth in the PATRIOT Act with the old, unchanged instructions from Congress set forth in the Telemarketing Act. Thus, the agency noted that:

> Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.

See 68 Fed. Reg. 4580, 4585 (January 29, 2003). This reconciliation of the two statutes, as the lower court explained, is "[t]he only logical conclusion that can be drawn from reading these two provisions together." *See Nat'l Fed. of the Blind*, 303 F. Supp. 2d at 714. And it is thus no surprise that the agency reached it.

In fact, when it announced the TSR, the FTC specifically responded to comments it had received from charities

claiming that this interpretation of Congress' instructions created "a double standard"—increasing costs for only those charities who choose to use telefunders and not for those charities who do not. In response, the FTC explained:

> Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible.
>
> . . .
>
> . . . the jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits.

See 68 Fed. Reg. at 4586, 4587.

The dissent finds itself unable to accept the distinction between paid solicitors and in-house volunteers. It rejects the view that telefunders, presumably on commission, will more aggressively pursue residents because "[u]nlike the FTC, [the dissent] cannot accept that one's strongest motivations are always monetary." Dissenting Op. at 32 n.2. Whether or not one accepts the view that paid solicitors are more likely to hound residents for money, the question before us is not a matter of substantial evidence review of an agency decision, but rather a question of whether we have an adequate basis in law for finding the TSR to be unconstitutional. No such basis exists.

The distinction of which appellants complain was something the agency was bound to make by simple application of its jurisdictional limitations. And, what is more, drawing this sort of line is not a new enterprise for the FTC. The agency has made distinctions in the past—analogous to the one challenged here—with regard to telemarketing done on behalf

of other entities outside its jurisdiction. The introduction to the TSR explains:

> The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered by this Rule. This reading is consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.

68 Fed. Reg. at 4586 (quotation marks omitted).

When an agency regulates to the extent of its jurisdiction it will unavoidably leave out some speakers and some speech that is beyond its authority to regulate. But, in such circumstances, the danger of governmental overreaching—which cases such as *Discovery Network* aim to prevent—is removed. Unlike in those cases, here it does not make sense to see this unavoidable distinction as a red flag indicating First Amendment problems. Any underinclusiveness that appellants have identified is not the result of the FTC attempting to favor one side of a public debate over another, *City of Ladue*, 512 U.S. at 51, or pursuing an illegitimate governmental interest, *League of Women Voters*, 468 U.S. at 396, or not genuinely serving the interest it purports to seek, *Florida Star*, 491 U.S. at 540. Rather, such underinclusiveness results from the simple fact that the PATRIOT Act designated "charitable solicitations" as being within the type of behavior the FTC could regulate, but it left speech by charities outside the agency's jurisdiction.

The agency's jurisdictional boundary, therefore, serves as the "neutral justification" for the distinction that was missing in *Discovery Network*. *See* 507 U.S. at 429-30. While plain-

tiffs complain that the regulation also fails to cover some commercial, political, and intrastate speech, this fact too is explained by the FTC's assiduous attention to its own jurisdiction.

Appellants' argument suffers from another flaw. They ask us to hold that the FTC's distinction, based on the clear congressional directives governing its jurisdiction, is unconstitutional. But if we did so, then any regulation by any federal agency that applied to only some speakers would be imperiled. Worse still, Congress could not remedy such defects by re-assigning jurisdiction among agencies. For the reassignment would itself necessarily distinguish among speakers or speech that each agency can regulate. This is so because jurisdiction, by its very nature, is underinclusive. The upshot of appellant's position is thus a stark choice for lawmakers—either assign all regulation touching on speech to one federal agency, or do not regulate at all. We do not believe the Constitution hamstrings Congress in such a manner.

In any event, effectively instructing Congress to reorder an agency's jurisdiction would be an unwarranted exercise of judicial authority. Agency jurisdiction often reflects traditional areas of expertise and experience which extend well beyond this or indeed any single problem. *See Weinberger v. Bentex Pharm. Inc.*, 412 U.S. 645, 654 (1973) (emphasizing agency "specialization" and specific "insight gained through experience"). Congress has a great deal on its plate, and it is neither wise nor within our competence as judges to casually direct the legislative branch to re-organize executive agencies.[6]

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[6] In this regard, we do not find it surprising that different agencies might adopt different policies. The point has been made that the FCC, when interpreting the Telephone Consumer Protection Act, exempted all charitable speech from its regulation and did not distinguish telefunders

Our fine dissenting colleague takes to task the FTC's action because it offends the all-or-nothing way in which the dissent believes the government should operate. In the dissent's view, government is not entitled to messy or untidy solutions, but instead is confined to sweeping pronouncements, bereft of the ability to make distinctions or to strike compromises. This is a view that we cannot accept. Indeed, we note that accepting plaintiffs' underinclusiveness arguments would strike a blow to the democratic process and our structure of government. We have no warrant to prevent the government from addressing a problem one step at a time. And, if we were to strike down these regulations as underinclusive, we could well provoke legislatures to pass broader regulations that would prove far more damaging to free speech. We thus need not prevent the government from confronting problems incrementally; to do so would ignore the warning that the government is not required to "make progress on every front before it can make progress on any front." *See United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

VI.

The same respect for the democratic process that leads us to credit the FTC for faithfully applying its jurisdictional mandate counsels respect for the obvious efforts the agency has taken to balance the competing interests involved. Indeed, were we not to respect the compromises made by the agency, we would be depriving our legislative and executive branches of the authority to protect residential privacy even to the modest extent that these regulations do.

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from in-house charity callers. We note that the two agencies are operating with different jurisdictional boundaries and are interpreting different statutes. In any event, the fact that two agencies disagree with each other is hardly remarkable. For such variance is commonplace in government. The mere fact of agency disagreement does not suggest to us that one or the other view is unconstitutional.

A brief review of the TSR underscores its status as a series of compromises. The regulations do not, for instance, prohibit telemarketing altogether—only early morning and late night calls are disallowed. Neither do the regulations require a cumbersome and lengthy disclosure of identifying information—only the name of the charity represented and the purpose of the call must be disclosed. Furthermore, the regulations do not subject telefunders to the more restrictive national do-not-call list—instead they must only comply with a charity-specific registry.

Indeed, the agency's compromises are explicitly recognized in the TSR itself. Aware of *Riley*, *Schaumburg*, and *Munson*, the Commission properly noted the importance of "minimz[ing] the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf." 68 Fed. Reg. at 4636. The agency was explicitly sensitive to the fact that smaller charities tend "to employ for-profit firms to make their calls." *Id.* at 4666. Because of this, the FTC was concerned that subjecting telefunders to a national do-not-call list would "sweep too broadly," *id.* at 4636, and it thus settled on a "more limited approach" requiring telefunders to honor only a charity-specific do-not-call list. *Id.* at 4637. This compromise, it noted, was "likely to be of significant benefit to smaller charities," id. at 4666, and "work[ed] better to accommodate both the right of privacy and the right of free speech." *Id.* at 4637.

These regulations are, in short, the product of a necessary balancing. The rights of charities and telefunders to communicate with potential donors were weighed against the right of those donors to enjoy residential peace. In this respect, the regulations are akin to the numerous time, place, and manner restrictions on speech that the Supreme Court has often upheld against First Amendment challenge. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989). Just as those restrictions balance the government's interest in protecting the community, *see id.* at 796, against a speaker's right to disseminate his ideas, *see id.* at 802 (regulation must "leave

open ample alternative channels of communication"), so do the FTC's restrictions on telemarketing accomplish such a reconciliation of personal and public interests.

The dissent analogizes what took place here to a decision by Congress to assign a particular agency jurisdiction over speakers with a particular political orientation or point of view. Dissenting Op. at 34-35 (discussing hypothetical agency jurisdiction "over one political party"). This analogy is so far afield from the neutral character of the jurisdictional division here as to be apples and oranges. Like time, place, and manner restrictions, the TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller. "[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). And narrowly-drawn content-neutral restraints on speech represent a permissible governmental response to a legitimate and substantial public concern. *See Ward*, 491 U.S. at 798-99.

Compromises of this sort are critical to a government of separated powers. They permit all three branches to participate in striking a balance between individual rights on the one hand and public interests on the other. The judicial branch identifies a constitutional right (as in *Riley*), and then the executive and legislative branches reconcile respect for that right with a measured protection of the public interest. We should be wary of upsetting such a delicate dance in which all three partners of government play their distinctive roles.[7] Courts have their vital part to play, but here it is best

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[7] Admittedly, the FTC is often called an "independent agency" and is not fully accountable to the executive branch. However, the FTC

performed in conjunction with, and not to the exclusion of, the coordinate branches of our government.[8]

VII.

Our Constitution does not prevent the democratic process from affording the American family some small respite and sense of surcease. We hold, therefore, that the FTC was authorized by Congress to promulgate the TSR, and we find that the rule is consistent with the First Amendment. Since it is "narrowly drawn" to serve the "strong subordinating interest" of protecting residential peace, the TSR embodies a proper compromise between the important speech interests of charities and the equally important need to protect the public from excessive intrusions into the home. *Munson*, 467 U.S. at 960-961. The district court's judgment is accordingly

AFFIRMED.

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acted pursuant to an explicit congressional directive, *see* 15 U.S.C. § 6102(a)(1), and it conducted hearings giving ample opportunity to interested parties to voice concerns within this congressional rubric. *See* 68 Fed. Reg. 4580, 4582 (Jan. 29, 2003). It thus reflects the efforts of our democratic branches.

[8] The charities additionally claim that the TSR constitutes an impermissible prior restraint of speech, and violates the Equal Protection Clause. We find these arguments to be without merit.

First, as the district court noted, plaintiffs' prior restraint argument " ignores the long-held distinction between prior restraints and subsequent punishments." *Nat'l Fed. of the Blind v. FTC*, 303 F. Supp. 2d 707, 723- 24 (D. Md. 2004). Traditionally, unconstitutional prior restraints are found in the context of judicial injunctions or a licensing scheme that places "unbridled discretion in the hands of a government official or agency." *FW / PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990). Here, by contrast, it is only after the speech is uttered that a violation of the TSR can occur and sanctions can be imposed.

Second, there is no Equal Protection violation for the same reasons there is no First Amendment violation. *See Nat'l Fed. of the Blind*, 303 F. Supp. 2d at 723.

DUNCAN, *Circuit Judge*, dissenting:

There are few more annoying occurrences than the disruption of one's sleep due to a late-night or early-morning phone call by a telephone solicitor. Whether the end result is simply mild frustration (due to an ill-timed solicitation) or actual fear (due to the phenomenon of "abandoned calls"), the invasion of privacy that the majority identifies due to unwanted telephone solicitations is certainly a compelling interest that government can seek to remedy. I do not disagree with the majority's assessment that the regulations at issue in this case are modest attempts by the Federal Trade Commission ("FTC") to provide some respite to the public from the barrage of such intrusions. Were these regulations to apply equally to all charities that seek to engage in telephone solicitations, I would concur in the majority's decision to affirm. However, because the TSR in my view impermissibly distinguishes between the type of speech permitted based upon the identity of the speaker without any legitimate neutral justification, I must unfortunately, respectfully, dissent.

I.

As the majority correctly points out, a law or regulation is underinclusive when it restricts the speech of one group of speakers but not that of another similarly situated group without a legitimate "neutral justification" for the distinction. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993). Even where, as here, the government has a compelling interest in regulating a particular type of speech, its distinctions between similarly situated actors must reflect a "reasonable fit" between the restriction and the goal to be achieved by the disparate treatment. *Id.* At 417. If the distinction restricts speech in a way that does not achieve its stated goal, or is made without sufficient evidentiary justification, the regulation is constitutionally underinclusive.

In *Riley v. Nat'l Fed. Of the Blind of North Carolina, Inc.* 487 U.S. 781 (1988), the Supreme Court made clear that the two groups at issue here, charities that use "telefunders" and those that keep solicitation in-house, are similarly situated actors. *Riley* involved a North Carolina statute requiring all professional fundraisers to disclose to potential donors the percentage of the charitable contributions collected in the previous twelve months that was actually turned over to the charity. *Id.* at 784 n.2. The Supreme Court struck down the requirement, holding that the state's interest in informing donors about the charity's fundraising agreement did not outweigh the fundraisers' significant speech interests. *Id.* at 798-99.

Most importantly for our purposes, the Court noted that the statute's key deficiency was that it necessarily only applied to those charities that used professional fundraisers. *Id.* at 784. The Court recognized that in addition to the heightened scrutiny given to all regulations affecting charitable solicitations, courts should be especially cognizant of the comparative effect regulations that distinguish between charities based upon the professional/volunteer status of the solicitor can have on the success of the charity itself. *See id.* at 799. Because charities using professional solicitors are likely to be smaller and less popular than those relying on in-house efforts, the statute's application of the financial disclosure requirements to these professional fundraisers would place them at a competitive disadvantage. The state in *Riley* argued that even under this heightened scrutiny, its regulation was justified due to the increased risk of fraud inherent in telefunder solicitation. The Court specifically rejected this assertion, holding that there exists "no nexus" between the percentage of funds retained by a solicitor and the likelihood of fraud. *Id.* at 793. Because regulations that distinguish between charities can affect the financial success of one vis a vis another, such distinctions must have a compelling justification. With no evidence to support the state of North

Carolina's bald assertion of a greater likelihood of fraud, the court held that the state could not treat these similarly situated actors differently, and the distinction could not be upheld. *Id.* at 798-99. It is against this backdrop that we must review the regulation now before us.[1]

The FTC asserts that it intended the amended TSR to further the dual goals of fraud protection and consumer privacy. However, it is unclear that either of these goals is advanced in any material way by the TSR's inclusion of only solicitations made by telefunders rather than the broader category of all charitable solicitors in its speech restrictions. The district court found sufficient the FTC's declaration that a professional telefunder's financial interest in obtaining greater contributions leads it to be more likely to engage in fraudulent behavior than a non-professional solicitor. *Nat'l Fed. of the Blind v. F. T.C.*, 303 F. Supp. 2d 707, 721 (D. Md. 2004). However, the FTC, when pressed at oral argument, conceded that there existed "*no empirical evidence*" in the administrative record to support this assumption. In fact, the FTC conceded that the only evidentiary support the agency had for solely applying the TSR to telefunders was its intuitive, "common-sense" assumption that telefunders commit fraud more frequently. This is the exact assumption rejected by *Riley*. Further, as it is not grounded on any fact that the FTC or this court has before it, I cannot accept it as a "neutral justification" for the speech limitation distinction.[2]

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[1] In its well-reasoned opinion, the majority considers *Riley* but does not address its implications concerning underinclusiveness. While the regulations at issue here may be more limited than in *Riley*, there is no indication that its holding that charities are similarly situated actors that must be treated equally without compelling justification is any less applicable.

[2] The majority is correct in asserting that our review is not one for "substantial evidence," but rather is a question as to whether we have a substantial basis for finding the regulation unconstitutional. Majority Op. at 24. Here we most certainly do. The lack of evidence (as opposed to

The same evidentiary deficiencies undercut the FTC's conclusion that its regulations advance the goal of protecting consumer privacy. While it cannot be doubted that the government's rules will prevent some degree of consumer annoyance, the FTC again presents *no evidence* that telefunders are more likely to be violators of consumer privacy or engage in abusive telemarketing practices than in-house solicitors. There is *no suggestion* in the record that consumers are more likely to feel that their privacy is invaded when receiving a call from a telefunder than a volunteer or in-house employee of a charitable organization. The FTC has also provided *no evidence* showing that telefunders generate a majority, or even a significant percentage of the charitable solicitation calls. It is not enough for us to accept the agency's rationale that the regulation is justifiable because it will help consumers in some small way. *See Discovery Network*, 507 U.S. at 426 (1993) (holding that a selective ban on commercial newsracks was not justifiable simply because it would "in some small way limit the total number of newsracks."). In order for it to pass the underinclusiveness test, the FTC must show that the evidence illustrates that it makes sense to treat these similarly situated charities differently. This it does not do.

It is certainly not the case that the First Amendment requires the government to regulate all aspects of a problem

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"common-sense" assumptions) providing a "neutral justification" for the distinction between telefunders and in-house solicitors requires the finding of a First Amendment violation.

Further, even if such so-called "common sense" assumptions were a sufficient evidentiary basis for speech distinctions (and *Discovery Network* counsels that they are not), I would not accept this one. It could just as plausibly be argued that a solicitation conducted by someone with a personal interest in the success of a charity (such as an employee or a volunteer) may lead to more overreaching and thus a greater potential for fraud. Unlike the FTC, I cannot accept that one's strongest motivations are always monetary.

before regulating any part of it. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993). We generally give the government the latitude it needs to find ways to address problems in society in the manner in which it sees fit, and those judgments are deserving of deference.[3] However, where, as here, no evidentiary basis has been articulated for the disparate treatment of similarly situated groups, such deference is unwarranted. *See Florida Star v. B.J.F.*, 491 U.S. 524, 537-38 (1989). The FTC has made no showing that the professional/non-professional distinction it employs in the TSR furthers the goals of fraud prevention and consumer privacy. It is this showing that *Discovery Network*'s "neutral justification" and "reasonable fit" requirements compel. 507 U.S. at 428-30. Because these requirements are not satisfied, the TSR cannot survive.

The majority characterizes my analysis as reflecting a belief that government must act in an "all-or-nothing" manner. It asserts that I believe that the government cannot undertake "messy" solutions, but rather must only make "sweeping pronouncements." Majority Op. at 26. It is unclear to me how such broadly painted assumptions about my beliefs concerning the role of government could be ascertained from such a narrow dissent; in any event, nothing could be further from the truth. Rather, I simply believe that the Supreme Court meant what it said in *Discovery Network* that without a "neutral justification," neither Congress nor executive agencies can create speech restrictions that treat similarly-situated actors differently. 507 U.S. at 428-30. The FTC had ample

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[3] The majority's deference borders on subservience. By suggesting that after the judiciary finds a constitutional right, as in *Riley*, it is then up to the legislative and executive branches to define the scope of that right, the majority seems to suggest a far too limited role for the courts. However the "elaborate dance" between the governmental branches is to proceed, the judiciary cannot relinquish its role as the ultimate protector of constitutional guarantees.

opportunity during the rule-making process to create an evidentiary record to support the distinction it has drawn. It failed to do so, and the majority's mischaracterization of my views and expressions of concern for the "democratic process" and "our structure of government" are no substitute. The government is certainly able to "make distinctions or to strike compromises," Majority Op. at 26, but in doing so, it must abide by the First Amendment. Here, the FTC did not.

II.

Seeking to save the FTC from these evidentiary deficiencies, the majority holds that the distinction the TSR draws between in-house fundraisers and external telefunders is justified due to the agency's jurisdictional restraints. The FTC Act gives the agency jurisdiction over "persons, partnerships and corporations," but no authority over nonprofit organizations. 15 U.S.C. § 45(a)(2). The majority correctly notes that without the jurisdiction to regulate all nonprofit organizations, the FTC has no ability to correct the underinclusiveness inherent in the TSR. According to the majority, some degree of underinclusiveness is inevitable in all agency regulation, and an agency's jurisdictional boundaries can therefore serve as the "neutral justification" for an underinclusive distinction.

The implications of this holding are staggering. If a regulation that places different restrictions on speech based upon the identity of the speaker can be upheld simply by relying on the jurisdiction of the agency as the "neutral justification" for the distinction, this court will have created a perverse incentive for all legislative bodies. Congress can restrict speech, even unconstitutionally, so long as it does so by parsing jurisdiction between various agencies. If, for example, Congress were to give a particular agency jurisdiction over one political party—for instance if the Department of Homeland Security were given jurisdiction over the Independent party in America—the majority's holding would

allow a regulation that restricted that party's ability to raise funds to be upheld simply by referring to the agency's jurisdiction.[4] Restrictions on speech that go to the heart of the First Amendment, those differentiating solely on the identity of the speaker, would be given little to no scrutiny, as the legislative decision to disperse jurisdiction amongst various executive agencies would justify the disparities. The majority would allow Congress to do indirectly that which it cannot do directly, and that is to regulate speech in an underinclusive manner.

The majority's sole focus on the FTC's jurisdiction and that agency's inability to promulgate an even-handed regulation overlooks the fact that Congress is well able to correct the constitutional deficiency.[5] In this case it could have done so by simply expanding the FTC's jurisdiction to include all charitable solicitations, thus authorizing the agency to pass a regulation that advances the goals of fraud protection and consumer privacy materially and constitutionally. Congress could have also simply required the Federal Communications

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[4] The majority criticizes this analogy without providing any basis for distinguishing it from the situation before us. The government could disperse jurisdiction over political parties among various agencies without "exhibit[ing] any disapproval of the content" of the parties' messages. *See* Majority Op. at 28. If one of such agencies were then to create a set of restrictions that apply to all parties within its jurisdiction, and "impose burdens on speech without reference to the ideas or views expressed," the majority's reasoning would require us to uphold the restriction. Significantly, the majority is unable to point to any language in its opinion which would preclude such a result. The majority's unexplained assertion that my analogy is "so far afield" from the regulation at hand as to be "apples and oranges" reflects a conclusion rather than an analysis.

[5] The majority suggests that a "correction" by Congress of an agency's jurisdiction would in and of itself, be underinclusive. However it posits no basis for this proposition. If true, all Congressional grants of jurisdiction that differentiate between groups would be underinclusive. The First Amendment does not require this radical result; it simply requires some legitimate basis for differential treatment.

Commission, the agency with oversight authority over all non-telefunder charitable solicitation, to pass a similar regulation, thus insuring that all charities were on a level playing field in their quest to solicit funds. However what it cannot do is hide behind jurisdictional barriers which it erected as a shield for its unconstitutional restrictions on speech based upon the identity of the speaker.[6]

III.

The Supreme Court has recognized that the ability to raise funds is the lifeblood of a charity. *Riley*, 487 U.S. at 789. For very large or very popular charities, fundraising can be conducted in-house through employees of the charities or volunteers. The use of volunteers can even be a selling point to potential donors, as an individual's willingness to dedicate his or her free time to a cause suggests a strong belief in its goals. However, for small or unpopular charities, the ability to engage in mass volunteer fundraising may be impossible, and thus the use of professional fundraisers may hold the key to the entity's existence.

As charities compete for the finite charitable donation dollar, those charities that either choose to or are forced to use telefunders are placed at a competitive disadvantage by the regulations that affect them and not their charitable counterparts. It may very well be the case that following the regulations laid down in the TSR would be a good practice for all charities. Calling consumers early in the morning or in the middle of the night appears unlikely to provide the most

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[6] The majority's concern about judicial overreaching is understandable but inapplicable here. If Congress and the executive agencies have evidentiary reasons for their respective decisions to pass regulations that have the effect of treating similar groups differently, they may well pass constitutional muster. However when, as here, no such evidentiary basis exists, the effect of this Congressional choice is to create an unconstitutional restriction on speech. It is not overreaching to prevent this result.

successful fundraising strategy. However, whatever decisions the individual charities make, *Riley* and *Discovery Network* compel the conclusion that the government must apply an even hand. The FTC has no evidence and no reason beyond jurisdictional authority justifying its decision to regulate charitable solicitations differently based upon the identity of the speaker.

The majority holds that this suffices, and that Congress can justify unconstitutional restrictions on speech based upon the identity of the speaker simply by delineating jurisdiction over those speakers between various executive agencies. This argument is untenable. It provides a jurisdictional loophole through which government can achieve indirectly that which it cannot do directly. I do not believe that such jurisdictional parsing can be a "neutral justification" for a regulation that imposes different speech restrictions based upon the identity of the speaker. I therefore respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. JFM-03-963

NATIONAL FEDERATION OF THE BLIND,

and

SPECIAL OLYMPICS MARYLAND, INC.,

v.

FEDERAL TRADE COMMISSION.

ORDER

For the reasons stated in the accompanying memorandum, it is, this 24th day of February 2004

ORDERED that

1. Plaintiffs' motion for summary judgment is denied; and

2. Defendant's cross-motion for summary judgment is granted.

/s/ _____
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. JFM-03-963

NATIONAL FEDERATION OF THE BLIND,

and

SPECIAL OLYMPICS MARYLAND,

v.

FEDERAL TRADE COMMISSION.

MEMORANDUM

Plaintiffs National Federation of the Blind and Special Olympics Maryland, Inc. ("Plaintiffs") have filed this action against Defendant Federal Trade Commission ("FTC") challenging the amendments to the Telemarketing Sales Rule promulgated by the FTC. These amendments impose modest restrictions upon the activities of professional telemarketers who solicit charitable contributions on behalf of non-profit organizations. Plaintiffs claim that the amended rule exceeds the FTC's statutory authority and violates the First and Fifth Amendments to the United States Constitution. Pending before the court are the parties' cross-motions for summary judgment. For the reasons stated below, Plaintiffs' motion for summary judgment will be denied and Defendant's cross-motion for summary judgment will be granted.

A.

In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et seq.* That legislation directed the FTC to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices. 15 U.S.C. § 6102(a)(1). The defini-

tion of "telemarketing" in the statute was limited to plans, programs, or campaigns involving more than one interstate phone call, which sought to "induce purchases of goods or services." 15 U.S.C. § 6106(4) (1994). Congress also instructed the FTC to include several specific rules with respect to "abusive" practices, namely: (1) a requirement that telemarketers not undertake a pattern of unsolicited calls that the reasonable consumer would consider coercive or abusive of his right to privacy; (2) restrictions on the hours of the day and night during which unsolicited calls could be made; and (3) a requirement that the telemarketer promptly and clearly disclose to the consumer receiving the call that the purpose of the call is to sell goods or services. 15 U.S.C. § 6102(a)(3) (1994).

The Telemarketing Act expressly limited the activities that could be regulated by the FTC to those activities that were within the FTC's jurisdiction as defined by the FTC Act. 15 U.S.C. § 6105(a). Under the FTC Act, the FTC has jurisdiction over "persons, partnerships, or corporations," except for banks, savings and loan institutions, federal credit unions, common carriers, and some other entities not relevant to this case. 15 U.S.C. § 45(a)(2). To qualify as a "corporation," an entity must be organized to carry on business for its own profit or that of its members. 15 U.S.C. § 44. Incorporating these jurisdictional limits into the Telemarketing Act meant that nonprofit organizations were exempt from the scope of the statute.

In 1995, the FTC promulgated the original Telemarketing Sales Rule to implement the Telemarketing Act, codified at 16 C.F.R. §§ 310 *et seq.* This rule prohibited various deceptive telemarketing practices, 16 C.F.R. § 310.3, and also regulated certain abusive practices. 16 C.F.R. § 310.4. The FTC's jurisdiction was not restated in the rule because the Telemarketing Act clearly defined the agency's jurisdiction by incorporating the FTC Act. 60 Fed. Reg. 43842, 43843

(Aug. 23, 1995). In addition, the FTC specifically stated in the Final Rule that it did not intend to expand or contract its jurisdiction or the scope of the rule's coverage. *Id.*

In October 2001, after the September 11 attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001). Section 1011 of this statute amended the Telemarketing Act by expanding the definition of telemarketing to include calls intended to induce "a charitable contribution, donation, or gift of money or any other thing of value." 15 U.S.C. § 6106(4). The USA PATRIOT Act also added "fraudulent charitable solicitations" as a deceptive practice and directed the FTC to include rules in its regulations with respect to such solicitations. 15 U.S.C. § 6102(a)(2). Finally, the section of the Telemarketing Act describing the abusive practices that the FTC was to regulate was expanded to include a specific provision about the solicitation of charitable contributions. 15 U.S.C. § 6102(a)(3)(D). The USA PATRIOT Act did not, however, change the provision of the Telemarketing Act setting forth the FTC's jurisdiction. The FTC confirmed this point, stating, "Notwithstanding its amendment of these provisions of the Telemarketing Act, neither the text of section 1011 nor its legislative history suggest that it amends Section 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR." 67 Fed. Reg. 4492, 4496 (Jan. 30, 2002).

Soon after the enactment of the USA PATRIOT Act, in 2002, the FTC issued a Notice of Proposed Rulemaking that suggested a series of amendments to the original Telemarketing Sales Rule. The FTC received 64,000 comments about its proposed amendments and conducted a three-day public forum to discuss the amendments. 68 Fed. Reg. 4580, 4582 (Jan. 29, 2003). The Final Amended Rule ("TSR") was promulgated in January 2003. The TSR made clear that one

consequence of the USA PATRIOT Act was the expansion of the coverage of the Telemarketing Act (and thus the Telemarketing Sales Rule) to those telemarketers often called "telefunders"—that is, for-profit entities that solicit charitable contributions on behalf of non-profit organizations. *See* 68 Fed. Reg. at 4584-85. The FTC stated, "Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected." *Id.* at 4585. The TSR also added more restrictions on telemarketing to the original rule, only some of which applied to telefunders.

The restrictions in the TSR being challenged in this case are the following: (1) a company-specific do-not-call provision, which prohibits a telemarketer from calling any consumer who has indicated that she wants no further calls from that particular seller or organization, 16 C.F.R, § 310.4(b)(1)(iii)(A)[1]; (2) a prohibition on "abandoned calls," which requires the telemarketer to connect the call to a representative within two seconds of the person's completed greeting, 16 C.F.R. § 310.4(b)(1)(iv); (3) a prohibition on placing calls before 8:00 a.m. or after 9:00 p.m., 16 C.F.R. § 310.4(c); and (4) a requirement that telemarketers transmit caller ID information, 16 C.F.R. § 310.4(a)(7). The TSR also includes a specific requirement that telefunders promptly identify themselves and tell consumers that they are soliciting donations. 16 C.F.R. § 310.4(e).[2]

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[1] The TSR also created a national do-not-call registry and prevented telemarketers from calling any consumer whose name was included in this registry. 16 C.F.R. § 310.4(b)(1)(iii)(B). However, it specifically exempted all charitable solicitations from this provision. 16 C.F.R. § 310.6(a).

[2] The same requirement is applied to commercial telemarketers in a parallel provision of the TSR. 16 C.F.R. § 310.4(d).

B.

Also relevant to the issues presented in this case are certain statutes and rules involving the Federal Communications Commission ("FCC"). In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, which directed the FCC to issue rules concerning "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1). This statute expressly exempted calls or messages by tax-exempt nonprofit organizations from its definition of "telephone solicitation." 47 U.S.C. § 227(a)(3).

The FCC adopted rules implementing the TCPA in 1992, and in September 2002, it issued a Notice of Proposed Rulemaking seeking comments on whether to revise its TCPA rules. In early 2003, after the TSR was promulgated, Congress instructed the FCC to consult with the FTC to maximize consistency with the FTC's rules. In July 2003, the FCC released its final report amending the TCPA rules. The amended rules contain nearly identical provisions to those of the TSR that are challenged in this case, including the company-specific do-not-call provision, the time restrictions, the abandoned call provision, and the disclosure and caller ID provisions. *See* 16 C.F.R. §§ 64.1200, 64.1601. The FCC recognized that its amended rule would subject all commercial entities to its requirements, including those exempt from the FTC's jurisdiction. Report on Regulatory Coordination, 18 F.C.C.R. 18558, 18560 (2003). However, the TCPA exempted nonprofit organizations from its provisions, and the amended TCPA rules maintained this exemption. 68 Fed. Reg. 44144, 44160 (Jul. 25, 2003). The FCC also concluded, "In light of the record before us, the Commission believes that there has been no change in circumstances that warrant distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization from those made by the tax-exempt nonprofit itself" *Id.*

C.

Plaintiffs are both nonprofit organizations with tax-exempt status under § 501(c)(3) of the Internal Revenue Code. National Federation of the Blind is a group that provides support for blind persons and their families, as well as education, information, and referral services about blindness. Special Olympics Maryland, Inc. provides sports training and athletic competition for citizens with mental retardation, as well as public education, community services, and outreach initiatives. Both plaintiffs require charitable contributions to fulfill their program services, However, they do not have the resources to use in-house volunteers or employees as telemarketers. Instead, they hire professional representatives to conduct telemarketing with the purpose of inducing charitable contributions. As a result, the provisions of the TSR directly impact Plaintiffs' telephone solicitation.

In their complaint, Plaintiffs seek declaratory and injunctive relief, challenging the TSR on several grounds. They claim first that the FTC did not have the statutory authority to issue the TSR. Second, Plaintiffs make a facial challenge to the TSR on various First Amendment grounds. Third, they allege that the TSR violates equal protection, as applied to the federal government in the Fifth Amendment. Plaintiffs also raise the same claims specifically with respect to the call abandonment provisions of the TSR.

II.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, The materiality requirement means that only those factual disputes that might affect the outcome of the suit preclude the entry of summary judgment. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In order for there to be a "genuine" issue of material fact, the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Id.* If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-50.

Because this case involves review of the decisions of a federal administrative agency, the Administrative Procedure Act ("APA") is also applicable. According to the APA, the reviewing court may set aside agency action, findings, and conclusions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C). In making these determinations, the court must limit its review to the administrative record or those parts of it cited by the parties. 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

In addition, in cases where an agency's construction of a statute that the agency administers is in issue, a court must apply the two-step analysis laid out in *Chevron U.S.A., Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837 (1984). It must first be determined whether Congress has directly spoken to the precise question at issue. *Id.* at 842. If Congress' intent is clear, the court must give effect to that intent, and the analysis is complete. *Id.* at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. In this case, the *Chevron* analysis must be applied to the question of the FTC's interpretation of its authority under the Telemarketing Act and the USA PATRIOT Act's amendments. However, the opinion of the FTC as to the constitutionality of its regulations is not entitled to any deference—if the court

determines that these rules violate the Constitution, they must be invalidated. *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 979); *Mainstream Mktg. Serv., Inc. v. Federal Trade Commission*, 283 F. Supp. 2d 1151, 1160 (D. Colo. 2003).

The facts in this case are undisputed, and accordingly, the only question is which party is entitled to judgment as a matter of law.

III.

A.

Plaintiffs' first claim is that the FTC exceeded its jurisdiction by regulating in the TSR nonprofit organizations that employ telefunders. According to Plaintiffs, the USA PATRIOT Act does not evince an intention to regulate telefunders. Moreover, they contend that the USA PATRIOT Act amendments cannot be read to allow the FTC to regulate telefunders because such an interpretation would permit the FTC to indirectly exercise jurisdiction over exempt entities—namely, the nonprofit organizations themselves.

The plain language of the USA PATRIOT Act undermines Plaintiffs' contention. The Act expanded the definition of "telemarketing" to include solicitation of "charitable contributions." 15 U.S.C. § 6106(4). At the same time, the FTC's jurisdiction remained unchanged—that is, nonprofit organizations were still exempt from FTC regulation. 15 U.S.C. § 6105(a); 67 Fed. Reg. at 4496. The only logical conclusion that can be drawn from reading these two provisions together is that charitable solicitations by nonprofits themselves remain exempt, but charitable solicitations by professional representatives fall within the FTC's jurisdiction. If that were not the case, the addition of charitable contribution solicitations to the definition of telemarketing would have been meaningless.[3]

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[3] In their briefs, Plaintiffs relied on statements made by Senator Mitch

The FTC's interpretation of the statutes at issue is bolstered by case law regarding the jurisdiction of the FTC. Courts have held that an entity's exemption from FTC jurisdiction is based on that entity's status, not its activity. *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920, 923 (2d Cir. 1980); *Federal Trade Commission v. Miller* 549, F.2d 452, 455 (7th Cir. 1977); *Federal Trade Commission v. American Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994). Applied here, these cases indicate that because telefunders are not nonprofit entities, they can be regulated by the FTC, regardless of the fact that they engage in the same activities as the nonprofits. Indeed, two district

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McConnell (R-KY) at the introduction of the USA PATRIOT Act to support the claim that this statute's amendments to the Telemarketing Act were intended only to target fraudulent charities and not to protect home privacy. Senator McConnell certainly emphasized the problem of false charities in his attempts to persuade Congress of the need for the legislation. *See* 147 Cong. Rec. S 10059-01, S 10065 (daily ed. Oct. 2, 2001). However, the statements of one Congressman cannot be treated as a definitive recitation of Congress' purposes with respect to the statute.

Additionally, during oral argument, Plaintiffs pointed out that, in section 1011(1) of the USA PATRIOT Act, Congress first amended the Telemarketing Act to include fraudulent charitable solicitations as a deceptive practice, and then, in section 1011(3), amended the Telemarketing Act to add charitable solicitations to the definition of "telemarketing." Plaintiffs argued that this sequencing demonstrates that Congress' intention was merely to regulate fraudulent charities, but when it recalled that the FTC did not have jurisdiction over charities, it needed to amend the definition of telemarketing to add charitable solicitations. This argument very well might accurately describe the sequence of events, but it does not prevail over the plain language of the statute. The original Telemarketing Act instructed the FTC to issue rules that would prevent fraud and protect consumers' right to privacy, see 15 U.S.C. § 6102(a)(3), and the TSR addresses both these concerns. Congress must have recognized that by amending the USA PATRIOT Act to include charitable solicitations in the definition of telemarketing, *all* the telemarketing rules would apply to charitable solicitations. Otherwise, it would have written the USA PATRIOT amendments differently.

courts have held specifically that professional fundraisers hired by nonprofit organizations are not exempt from FTC jurisdiction even though the nonprofits themselves are exempt. *Federal Trade Commission v. Gold*, No. 99-2895, slip, op. at 5 (C.D. Cal. Dec. 13, 2000); *Federal Trade Commission v. Saja*, 1997 WL 703399, at *1 (D. Ariz. Oct. 7, 1997). I fully agree with this conclusion.[4]

B.

Plaintiffs make a separate claim that the FTC exceeded its statutory authority by issuing the call abandonment provisions of the TSR. There are two kinds of "abandoned calls": those in which telemarketers hang up on consumers without speaking to them, and those in which there is a prolonged period of silence between the time the consumer answers the call and the time the representative is connected to the call. 68 Fed. Reg. at 4641. Abandoned calls result from the use of mechanisms called "predictive dialers," which call multiple consumers at a time to permit sales representatives to maximize the time they actually speak to consumers and minimize the time they spend waiting to reach consumers. *Id.* A side effect of the use of predictive dialers is that the dialer

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[4] Plaintiffs' reliance on *Fruit Growers' Express Inc. v. Federal Trade Commission*, 274 F. 205 (7th Cir. 1921) is misplaced. In that case, the FTC entered a cease and desist order against equipment suppliers, claiming that the suppliers had made an unlawful contract with certain common carriers which, under the FTC Act, are exempt from FTC jurisdiction. *Id.* at 205. The court held that the carriers were necessary parties to the action, and thus the FTC could not enter an order regarding the contract because the carriers were subject to the exclusive jurisdiction of the Interstate Commerce Commission. *Id.* at 206-07. In this case, however, the nonprofit organizations hiring the telefunders are in no way "necessary parties" to any violations of the TSR by those telefunders. As such, the rule in Fruit Growers' does not prohibit the FTC from exerting its jurisdiction over the telefunders. *See also Official Airline Guide*, 630 F.2d at 923-24 (distinguishing *Fruit Growers'* because the exempt air carriers were not necessary parties to the unlawful acts).

often reaches more consumers than can be connected to sales representatives, and as a result, the dialer either disconnects the call or keeps the consumer connected in case a representative becomes available. *Id.* at 4641-42. Abandoned calls are defined by the TSR as those in which a telemarketer does not connect the call to a sales representative within two seconds of the consumer's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). The TSR prohibits abandoned calls but constructs a safe harbor that allows telemarketers to use predictive dialers in a regulated manner.[5]

Plaintiffs claim that the call abandonment provisions actually amount to a regulation of predictive dialers, and that the FTC has no authority to regulate these dialers because the authority to do so was given by Congress to the FCC. For support, they point to the TCPA, which restricts the use of telephone equipment and refers specifically to predictive dialers. 47 U.S.C. j 227(a)(1). However, Plaintiffs ignore the fact that while the FCC may have authority to regulate predictive dialers, the FTC was given authority in the Telemarketing Act to regulate abusive telemarketing practices. The FTC found in its notice and comment period that abandoned calls are "one of the most invasive practices of the telemarketing industry," because they frighten consumers, invade their privacy, and waste their time. 68 Fed. Reg. at 4642 n.723. Although the FTC cannot regulate the dial-

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[5] A telemarketer will riot be held liable for abandoning calls if (1) it employs technology that ensures that no more than 3% of calls are abandoned, measured per day per calling campaign; (2) for each call, the telemarketer allows the phone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call; (3) whenever a representative is not available to speak to the consumer within two seconds of the consumer's completed greeting, the telemarketer plays a recorded message that states the name and phone number of the seller on whose behalf the call was made; and (4) the telemarketer retains records establishing compliance with the first three requirements. 16 C.F.R. § 310.4(b)(4).

ers themselves, the Telemarketing Act does not restrict its authority to regulate abusive practices that may involve the use of dialers.

Plaintiffs cite no case law supporting their contention that the FTC and the FCC cannot both regulate the same area. On the contrary, the two district court opinions that have addressed this precise issue have held that the FTC has authority to regulate abandoned calls, despite the FCC's authority to regulate predictive dialers. *Mainstream Marketing Services*, 283 F. Supp. 2c1 at 1170 ("[T]he court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls"); *U.S. Security v. Federal Trade Commission*, 282 F. Supp. 2d 1285, 1292 (D. Okla. 2003) ("The [TSR's] restriction on abandoned calls is a permissible regulation of this most (and undisputedly) invasive and abusive practice, and its promulgation, which is in no way hindered or hobbled by the FCC's grant of authority, has carried into effect congressional intent as expressed by the [Telemarketing Act]"). Thus, while the Telemarketing Act does not directly address this issue, the FTC's interpretation of its authority is an entirely reasonable construction of the statute.

IV

The bulk of Plaintiffs' argument focuses on the TSR's alleged infringement of First Amendment free speech protections. Plaintiffs claim that: (1) the TSR is a content-based regulation that requires strict scrutiny; (2) the government's interests in promulgating the TSR are not compelling, and even if they were, the TSR is not narrowly tailored to support those interests because the regulations are underinclusive; (3) the TSR is overbroad; and (4) the TSR is an unlawful prior restraint.

A.

Because charitable solicitation involves a variety of speech

interests, it is entitled to the protections of the First Amendment. *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988); *Sec'y of State of Maryland v. Joseph H. Munson. Company*, 467 U.S. 947, 959 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). If a regulation restricts protected speech, the court must determine which standard of review is applicable. The principal distinction in First Amendment cases is between those regulations that are content-based and those that are content-neutral. Content-based regulations are subject to strict scrutiny—i.e., the government must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). By contrast, content-neutral regulations are subject to an intermediate level of scrutiny. *Turner Broad. Sys., Inc. v. Federal Communications Commission*, 512 U.S. 622, 642 (1994). Generally, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based. *Id.* at 643. Regulations that serve purposes unrelated to the content of expression are content-neutral, even if they have an incidental effect on some speakers or messages but riot others. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In this regard, the government's purpose in passing the regulation is the controlling consideration. *Id.* Even if a law distinguishes among speakers, it is only subject to strict scrutiny when it reflects a government preference for the substance of what the favored speakers have to say or an aversion to what the disfavored speakers have to say. *Turner*, 512 U.S. at 658.

The Supreme Court has articulated a specific standard of review that applies to charitable solicitations. When a government regulation is a direct and substantial limitation on charitable solicitation, it can only be sustained if it serves a sufficiently strong, subordinating interest that the government is entitled to protect. *Munson*, 467 U.S. at 960-61;

Schaumburg, 444 U.S. at 636; Moreover, the regulations must be narrowly drawn to serve the government's interests without unnecessarily interfering with First Amendment freedoms. *Schaumburg*, 444 U.S. at 637. While the Court never articulated that this standard was for content-neutral regulations, it closely resembles other content-neutral standards, such as the one applicable to time, place, and manner regulations. *See Ward*, 491 U.S. at 791 ("government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information") (internal quotations omitted). Indeed, courts addressing this issue have held that the *Schaumburg/Munson* standard is an intermediate scrutiny standard applicable to content-neutral regulations. *See Nat'l Fed 'n of the Blind of Arkansas v. Pryor*, 258 F.3d 851, 855 (8th Cir. 2001); *American Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000).

Plaintiffs claim that the TSR is a content-based restriction that requires strict scrutiny. On its face, however, the TSR does not resemble those regulations that are traditionally found to be content-based—that is, it does not draw distinctions between different kinds of speech based on the content of the messages conveyed. The TSR applies evenhandedly to all "telemarketing," which the statute defines without reference to the subject matter or viewpoint of the solicitation. *See* 15 U.S.C. § 6106(4). Indeed, although suggestions were made to carve out exemptions to the scope of the TSR, the FTC decided that "no exemptions based upon the type of organization engaged in telemarketing are warranted, and that all telemarketing (as defined in the Telemarketing Act as amended by the USA PATRIOT Act) conducted by any entity within its jurisdiction should be covered by the TSR." 68 Fed. Reg. at 4589.

Nevertheless, Plaintiffs point to three different groups that are allegedly exempt from regulation by the TSR. The first group is composed of commercial banks, credit unions, savings and loan institutions, and common carriers. As noted in Part I *supra*, however, these entities are exempt from the TSR only because they are exempt from the jurisdiction of the FTC in general. 15 U.S.C. § 45(a)(2). Plaintiffs do not cite, and I have not found, any case indicating that the exemption of a group from the scope of an agency's regulation due solely to its exemption from the agency's jurisdiction renders that regulation content-based.

Moreover, the gap created by the FTC's limited jurisdiction is filled by the FCC. The TCPA and the rules implementing it are applicable to all telemarketing, including those entities over which the FTC lacks jurisdiction. Report on Regulatory Coordination, 18 F.C.C.R. at 18560. Thus, the commercial entities outside of the FTC's jurisdiction are within the jurisdiction of the FCC. To ensure that these commercial entities are similarly regulated, the TCPA rules contain provisions restricting telemarketing that are almost identical to the ones set forth in the TSR. *See* 47 C.F.R. § 64.1200(a)(6) (call abandonment provision); § 64.1200(c)(1) (time restriction); § 64.1200(d) (company-specific do-not-call provision); § 64.1200(d)(4) (disclosure requirements); § 64.1601(e) (caller ID requirement). Because the FCC regulates these commercial entities to the same extent that the FTC regulates entities within its jurisdiction, this "exemption" from the TSR does not demonstrate any intent by the government to favor one group's speech over another because of the content of the message.[6] *Cf. Lucas v.*

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[6] This reasoning applies equally to the claim Plaintiffs raise in their reply brief that insurance companies are exempt from the TSR. In fact, the McCarran-Ferguson Act states that only those activities that constitute the business of insurance and are regulated by state law are exempt from the FTC Act. 15 U.S.C. § 1012(b). Because the Telemarketing Act incorpo-

Curran, 856 F. Stipp. 260, 273 (D. Md. 1994) (in equal protection context, no discrimination between First Amendment rights when organizations exempt under one statute are regulated under other statutes).

Plaintiffs also claim that the TSR is content-based because of its exemption of charitable solicitations by nonprofit organizations that do not hire professional telemarketers. Again, nonprofit organizations are not expressly excluded in the language of the TSR, but they are exempt from its scope because the FTC lacks jurisdiction over them. 15 U.S.C. § 45(a)(2). Unlike the commercial entities exempt from FTC jurisdiction, nonprofit organizations are also exempt from the TCPA and the TCPA rules. 47 U.S.C. § 227(a)(3). However, the lack of regulation of nonprofit organizations would only necessitate strict scrutiny if it evinced an intent by the government to favor the content of their speech over any other group. *See Turner*, 512 U.S. at 658. In this case, there is no differentiation based on the subject matter of the solicitations, but only on the status of the entities making the calls. The FTC could reasonably conclude, as it did, that professional telemarketers working on behalf of nonprofit organizations would be more likely to engage in fraud or overreaching than the nonprofits themselves because the professionals have a financial interest in obtaining the most contributions, whereas nonprofits are motivated by more altruistic concerns. *See Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 860 (E.D. Va. 1996); Lucas, 856 F. Supp. at 273.[7] Thus, the "exemption" for nonprofit organizations

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rates the jurisdictional limits of the FTC Act, such activities are also exempt from the TSR, but the TSR does not expressly exclude them on its face. Moreover, telemarketers selling insurance products are subject to the TCPA rules to the extent that such rules do not invalidate, impair, or supersede state insurance laws. *See* 68 Fed. Reg. at 44149- ISO.

[7] Plaintiffs challenge the FTC's conclusion regarding the likelihood of overreaching by telefunders because of the lack of empirical evidence in

also does not make the TSR a content-based regulation. *See Famine Relief Fund*, 905 F.2d 747 (4th Cir. 1990) (applying content-neutral *Schaumburg/Munson* test to regulations restricting only nonprofits that use professional solicitors); *Telco Communications v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989) (same).

Finally, Plaintiffs argue that the TSR is content-based because political speech is allegedly excluded from its scope. As with the first two alleged exclusions, the TSR by its terms does not expressly exempt any group or form of telemarketing, including solicitation by political organizations. Nevertheless, the FTC did indicate that it did not consider political *fundraising* to be within the scope of the TSR. *Id.* at 4589. However, this distinction was not an effort to carve out a particular subject matter from the TSR. Rather, it reflects the "basic common law distinction between charities and political organizations. 'Gifts or trusts for political purposes or the attainment of political objectives generally have been regarded as not charitable in nature. Also . . . a trust to promote the success of a political party is not charitable in nature.'" *Id.* at 4589 n.106 (citing 15 Am. Jur. 2d Charities § 60 (2002)); *see also* George Gleason Bogert et al., The Law of Trusts and Trustees §§ 328 and 378 (Rev. 2d ed. 1992); John D. Perovich, Annotation, *Validity and Construction of Testamentary Gift to Political Party*, 41 A.L.R. 3d 833, §§ 3[c] and 4 (1972). Thus, political fundraising is exempt from regulation by the TSR not because it deals with politics as opposed to other subjects, but because gifts to political organizations are simply not considered "charitable," and

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the record. The Supreme Court has never laid down a categorical rule requiring that empirical evidence be shown to support every restriction on speech, and at least one court has specifically held that the absence of empirical evidence was not fatal to a speech restriction that distinguished between types of charitable solicitations. *Auburn Police Union v. Carpenter*, 8 F.3d 886, 899-900 (1st Cir. 1993).

accordingly, are not within the scope of the TSR.[8]

This basic distinction between charitable and political contributions is further evident from the fact that Congress has developed a completely separate scheme to regulate political fundraising. As noted by the FTC, Congress has established an administrative body--the Federal Election Commission ("FEC")—and a comprehensive and detailed statutory structure applicable to political fundraising, codified at 2 U.S.C. §§ 431-455. 68 Fed. Reg. at 4590. Federal election law includes provisions limiting sources from whom candidates may accept contributions, 2 U.S.C. §§ 441b, 441c, 441f; requiring candidates to disclose receipts and disbursements, 2 U.S.C. § 434; requiring them to make certain disclosures when soliciting funds, 2 U.S.C. § 441d; and prohibiting them from making fraudulent representations when soliciting funds. 2 U.S.C. § 441h. In addition to exemplifying the differences between charitable and political contributions, these regulations are significant to the *Ward* analysis of content-based regulations. According to *Ward*, the government's purpose is the primary focus of whether a regulation is content-based. As was the case with the commercial entities exempt from FTC jurisdiction, the extensive regulation by another agency of the activities of political candidates casts serious doubt on Plaintiffs' contention that the TSR was intended to favor certain groups or subject matter over others. *Cf. Lucas*, 856 F. Supp. at 273.

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[8] Plaintiffs argue also that a political contribution falls under the definition of telemarketing because it is included in the catch-all phrase "any other thing of value." *See* 15 U.S.C. § 6106(4) ("The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value"). As the FTC correctly points out, the phrase "any other thing of value" is modified by the adjective "charitable." Thus, even if a political contribution is a thing of value, because it is not charitable, it is not regulated by the TSR.

In sum, Plaintiffs have not demonstrated that the TSR is a content-based regulation requiring strict scrutiny. Accordingly, I will apply intermediate scrutiny to the TSR and use the *Schaumburg/Munson* test for content-neutral charitable solicitation.[9]

B.

Under the *Schaumburg/Munson* test, a regulation that directly and substantially limits protected speech must be narrowly tailored to serve a substantial government interest. *Munson*, 467 U.S. at 960-61. According to the FTC, the TSR had two basic purposes: to prevent fraud and to protect privacy in the home. 67 Fed. Reg. at 4497.[10] Courts have repeatedly held that the prevention of fraud in charitable solicitation is a substantial interest that the government is entitled to protect, *Riley*, 487 U.S. at 792; *Schaumburg*, 444 U.S. at 836; *Telco*, 885 F.2d at 1231; *Lucas*, 856 F. Stipp. at 271, and that protection of privacy in the home from unwanted speech is also a strong, subordinating interest that justifies government regulation. *See Frisby v. Schultz*, 487

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[9] Even if I were to apply strict scrutiny to the TSR, it would still be upheld based on the compelling nature of the government's interests and the narrow tailoring of the restrictions to serve those interests. *See* discussion *infra* Part IV.B.

[10] Plaintiffs challenge whether the prevention of fraud was actually a government interest. To support this argument, they cite to one statement in the Final Amended Rule that only refers to the interest of protecting home privacy and not to the prevention of fraud. 68 Fed. Reg. at 4636. However, this statement was made with respect to the company specific do-not-call provision only. The Final Rule includes other statements relevant to the USA PATRIOT Act amendments and different provisions of the TSR that suggest the prevention of fraud as a government interest. *See, e.g.*, 68 Fed. Reg. at 4612-13 (USA PATRIOT Act amendments); 68 Fed. Reg. at 4627 (caller ID provision); 68 Fed. Reg. at 4635 n.699 (do-not-call registry).

U.S. 474, 485 (1988); *Schaumburg*, 444 U.S. at 638; *Carey v. Brown*, 447 U.S. 455, 470-71 (1980).[11]

Still, Plaintiffs' contend that the TSR is not narrowly tailored to serve these interests because it is underinclusive. Underinclusiveness of a regulation has been found to be impermissible in three circumstances: (1) where underinclusiveness indicates that the regulation is intended to give one side of a debate an advantage over another, *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); (2) where the regulation excludes so much speech that it undermines the likelihood of a genuine governmental interest, *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984); see also City of *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-26 (1993); and (3) where the underinclusiveness is so severe as to cast doubts on whether the government is actually serving the interests that are supposed to justify the regulation. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *see also City of Cincinnati*, 507 U.S. at 424-26.

In this case, Plaintiffs claim that the TSR is underinclusive for the same reason that they argue it is content-based—namely, the exemption of certain commercial entities, nonprofit organizations that do not hire telefunders, and political

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[11] Plaintiffs claim that the government has no interest in protecting consumers' homes from charitable solicitations because, they assert, people do not feel their privacy is invaded by calls seeking charitable contributions. In support of this assertion, they cite to a portion of the administrative record indicating that only 100 consumer email comments received by the FTC responded to a direct question about whether charitable fundraisers should be treated differently from commercial fundraisers. 68 Fed. Reg. at 4637 n.685. The FTC read this response to mean that consumers are disturbed by unwanted calls regardless of whether the caller wishes to make a sale or ask for a charitable contribution. 68 Fed. Reg. at 4637. This interpretation of the record is entirely reasonable. Indeed, if more people distinguished charitable and commercial calls with respect to the privacy intrusion involved, they presumably would have responded to the question.

fundraising. The rationale for my decision that the TSR is not content-based applies equally here. The TSR's evenhanded application to all telemarketing demonstrates that by its terms, the TSR favors no speaker, subject matter, or viewpoint over any other. Furthermore, the extensive regulation by other agencies of all commercial entities and political fundraising indicates that the government's interests in preventing fraud and protecting home privacy are substantial and that the government is committed to furthering those goals as much as possible. The choice not to regulate nonprofit organizations simply reflects the government's reasonable conclusion that its interests would not be furthered by restricting these groups due to their differing incentives.

Furthermore, the regulations themselves are very narrowly drawn to prevent only particularly abusive practices and leave First Amendment rights largely unrestricted. Those provisions aimed to protect home privacy do so with limited interference on free speech. For example, the limits on calling time reflect concerns that calls at either end of the day are particularly invasive of home privacy, but they still provide a "reasonable window [from 8:00am to 9:00pm] for telemarketers to reach their existing and potential customers." 68 Fed. Reg. at 4647. In addition, company-specific do-not-call lists are much less invasive of speech than the national do-not-call registry, for telefunders working for nonprofits are permitted to call anyone once in an effort to convey their message and solicit donations. Yet these lists also uphold the consumer's right not to be forced to listen to speech that she has already identified as unwelcome. *See Rowan v. United States Post Office Dept*, 397 U.S. 728, 737 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit"). Finally, the call abandonment provisions target one of the most abusive telemarketing practices in terms of home privacy but still provide telemarketers with a safe harbor that is not unduly burdensome. Nonprofits concerned that this restriction will

necessarily result in a decreased number of calls placed need only hire telemarketers that employ the practices delineated in the safe harbor provision. These practices are certainly feasible for professional telemarketers, and they are entirely reasonable given the important interest that is served.

In addition, the provisions intended to prevent fraud do not limit the number of calls made or interfere with the ability to convey a message. The Supreme Court has "repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions." *Illinois ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 123 S. Ct. 1829, 1842 (2003). Specifically, the Court has upheld requirements that professional fundraisers disclose their professional status, *Riley*, 487 U.S. at 799 n.11, and that telefunders and charities disclose their finances. *Riley*, 487 U.S. at 800; *Munson*, 467 U.S. at 961-62 n.9. Disclosure of the identity of the caller and the charity on whose behalf he is soliciting certainly furthers the government's interest in ensuring that consumers make informed decisions about their contributions. These disclosures also decrease the possibility that a caller soliciting on behalf of a fraudulent charity will succeed in his efforts. Moreover, a caller ID requirement allows anyone attempting to solicit for a fraudulent charity to be held accountable for his actions and permits consumers who have indicated an unwillingness to donate or be called again to avoid repeated calls by telemarketers ignoring their requests. *See* 68 Fed. Reg. at 4627.

In short, the TSR satisfies the standard set forth in *Schaumburg* and *Munson*. The FTC's interests in passing the regulation are substantial interests that the government is entitled to protect, and the restrictions are narrowly tailored to further those interests without unnecessarily interfering with freedom of speech.

C.

Plaintiffs' next First Amendment argument is that the TSR is impermissibly overbroad. The temp "overbreadth" can be used to describe two distinct sorts of First Amendment challenges. The primary meaning of "overbreadth" deals with prudential standing: a person whose own conduct is unprotected can bring an overbreadth challenge to assert the rights of third parties whose conduct is protected, even though the regulation as applied to the litigant would be constitutional. *Munson*, 467 U.S. at 967 n.13. In such an action, a regulation may be invalidated only if the overbreadth is substantial. *Bd. of Airport Comers of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Specifically, the Court has required that there be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The second meaning of "overbreadth" is simply a challenge to a statute or regulation that in all its applications directly restricts protected First Amendment activity and is not narrowly tailored to serve the government's interests. *Munson*, 467 U.S. at 967 n.13.

In this case, Plaintiffs claim that the TSR is overbroad because it creates a chilling effect on all nonprofit organizations that use telefunders, preventing them from exercising their fully protected right to solicit charitable contributions. To support this argument, they cite to passages in *Munson* regarding prudential standing—that is, the *ability* of one whose speech is not protected to bring an action for the benefit of those whose speech is protected and whose rights are chilled by a particular regulation. *See Munson*, 467 U.S. at 956, 958. Thus, Plaintiffs appear to be invoking the standing notion of overbreadth. However, merely citing to the statements from *Munson* does not prove that the TSR is actually

overbroad. Plaintiffs have not demonstrated that there are third parties whose speech rights will be affected in a manner different from Plaintiffs' own rights, nor have they shown that these third parties' rights will be significantly compromised by the TSR. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000).

It appears, therefore, that Plaintiffs are simply using the language regarding the standing notion of overbreadth to support an argument for the second notion of overbreadth—namely, that the TSR is not narrowly tailored to restrict only as much speech as will serve the government's substantial interests. In that regard, I have already found that Plaintiffs' argument fails. The TSR is not impermissibly underinclusive, and the regulations themselves are drawn extremely narrowly.

D.

Plaintiffs' final First Amendment argument is that the TSR, including its call abandonment provisions, is an unlawful prior restraint. Prior restraints have been defined as "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Such orders may take the form of temporary restraining orders or permanent injunctions issued by courts, *id.*, or licensing schemes in which administrators are given unbridled discretion to determine a speaker's right to be heard. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990); *Saia v. People of State of New York*, 334 U.S. 558, 560-61 (1948). Prior restraints are presumptively unconstitutional; the government must meet a heavy burden to justify any such restraint. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976).

In this case, Plaintiffs claim that the TSR is an unconstitutional prior restraint because it "silences" the speech of nonprofit organizations that use professional telemarketers. It

appears Plaintiffs are proposing that any regulation that inhibits or chills protected speech in some way is a prior restraint because the chilling effect of potential future punishment would prevent some speech before it would normally be made, absent the regulation. *Lucas*, 856 F. Supp. at 269. Under this theory, all time, place, and manner restrictions would be prior restraints because they place some limits on speech before the speech is actually uttered. *Id.*

Such a view misunderstands the meaning of "prior restraint" and ignores the long-held distinction between prior restraints and subsequent punishments. While it is presumptively unlawful to bar speech before it occurs, First Amendment law fully accepts the ability to penalize speech that occurred in the *past*, after it has been challenged and the speaker has had the opportunity for appellate review. *Alexander*, 509 U.S. at 553-54; *Nebraska Press*, 427 U.S. at 559. In this case, the TSR does not require any speaker to obtain a permit or license before he speaks, nor does it forbid any speech outright. Telemarketers are free to call anyone that they wish and say anything that they want. The time and manner of speech are somewhat limited, and certain disclosures must be made, but the ability to speak and the core message that is conveyed are untouched by the TSR. Furthermore, it is only after the speech is uttered that, if the telemarketer has violated the TSR, he may be brought into court by the state or a private individual. *See* 15 U.S.C. §§ 6103 and 6104. This is a typical subsequent punishment, and holding otherwise would practically erase the line between prior restraints and subsequent punishments. *See Alexander*, 509 U.S. at 554.

V.

Plaintiffs' third challenge to the TSR is that it violates the equal protection clause, as applied to the federal government in the Fifth Amendment. Equal protection analysis requires strict scrutiny of a government regulation when the regulation

interferes with the exercise of a fundamental right or operates to the particular disadvantage of a suspect class. *Mass. Bd. of Rel. v. Murgia*, 427 U.S. 307, 312 (1976). Rights protected by the First Amendment are fundamental rights. *See Perry Educ. Ass'n Perry Local Educators' Assn*, 460 U.S. 37, 54 (1983); Murgia, 427 U.S. at 312 n.3. Because charitable solicitation is fully protected under the First Amendment, and the TSR interferes with the ability of nonprofit organizations using telefunders to engage in charitable solicitation, strict scrutiny must be applied. *See also Carey v. Brown*, 447 U.S. at 461-62 ("When government regulation discriminates among speech-related activities . . . the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); *Special Programs*, 923 F. Supp. at 856-57 (citing *Carey* and applying a strict scrutiny standard); *Lucas*, 856 F. Supp. at 272 (same).

For the same reasons that the TSR withstands First Amendment analysis, it withstands equal protection analysis, even under a strict scrutiny standard. On its face, the TSR does not discriminate between any groups; it applies evenhandedly to telemarketing conducted by all entities. Of the groups cited by Plaintiffs as being treated more favorably by the TSR, two of them—commercial entities and nonprofit organizations that do their own soliciting—are exempt from FTC jurisdiction and cannot be regulated by the TSR even if the FTC wished to do so. Furthermore, the commercial entities are regulated almost identically by the FCC in the TCPA rules. Under these circumstances, it is evident that the government is not discriminating between the First Amendment rights of nonprofit organizations and commercial entities. *See Lucas*, 856 F. Supp. at 273.

The same holds true for political fundraising, the third so-called "exception" from the TSR, which is fully regulated by

the FEC and federal election laws.[12] The only entities identified by Plaintiffs that are not regulated at all are nonprofits that do not hire telefunders. However, the exemption of this group satisfies the strict scrutiny standard. The interests of the government in protecting privacy and preventing fraud are certainly substantial, see discussion *supra* Part IV.B., and the exclusion of these nonprofits from regulation reflects a legitimate belief that they will be less likely to engage in the sort of behavior the TSR is intended to prevent. *See Special Programs*, 923 F. Supp. at 860; Lucas, 856 F. Supp. at 273.

A separate order is being entered therewith.

/s/ _____
J. Frederick Motz
United States District Judge

Date: February 24, 2004

[12] Even though political fundraising is not exempt from FTC jurisdiction, it is not covered by the TSR because it is not "charitable." *See* discussion *supra* Part I.V.A.

APPENDIX D

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6101(2005)

§ 6101. Findings

The Congress makes the following findings:

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose $ 40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6102 (2005)

§ 6102. Telemarketing rules

(a) In general.

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices—

(A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,

(B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers,

(C) a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services;[,] and

(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

In prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.

(b) Rulemaking. The Commission shall prescribe the rules under subsection (a) within 365 days after the date of enactment of this Act [enacted Aug. 16, 1994]. Such rules shall be prescribed in accordance with section 553 of title 5, United States Code.

(c) Enforcement. Any violation of any rule prescribed under subsection (a) shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.

(d) Securities and Exchange Commission rules.

(1) Promulgation.

(A) In general. Except as provided in subparagraph (B), not later than 6 months after the effective date of rules promulgated by the Federal Trade Commission under subsection (a), the Securities and Exchange Commission shall promulgate, or require any national securities exchange or registered securities association to promulgate, rules substantially similar to such rules to prohibit deceptive and other abusive telemarketing acts or practices by persons described in paragraph (2).

(B) Exception. The Securities and Exchange Commission is not required to promulgate a rule under subparagraph (A) if it determines that—

(i) Federal securities laws or rules adopted by the Securities and Exchange Commission thereunder provide protection from deceptive and other abusive telemarketing by persons described in paragraph (2) substantially similar to that provided by rules promulgated by the Federal Trade Commission under subsection (a); or

(ii) such a rule promulgated by the Securities and Exchange Commission is not necessary or appropriate in the public interest, or for the protection of investors, or would be inconsistent with the maintenance of fair and orderly markets.

If the Securities and Exchange Commission determines that an exception described in clause (i) or (ii) applies, the Securities and Exchange Commission shall publish in the Federal Register its determination with the reasons for it.

(2) Application.

(A) In general. The rules promulgated by the Securities and Exchange Commission under paragraph (1)(A) shall apply to a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company, or any individual associated with a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company. The rules promulgated by the Federal Trade Commission under subsection (a) shall not apply to persons described in the preceding sentence.

(B) Definitions. For purposes of subparagraph (A)—

(i) the terms "broker", "dealer", "transfer agent", "municipal securities dealer", "municipal securities broker",

"government securities broker", and "government securities dealer" have the meanings given such terms by paragraphs (4), (5), (25), (30), (31), (43), and (44) of section 3(a) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c(a)(4), (5), (25), (30), (31), (43), and (44));

(ii) the term "investment adviser" has the meaning given such term by section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)); and

(iii) the term "investment company" has the meaning given such term by section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)).

(e) Commodity Futures Trading Commission rules.

(1) Application. The rules promulgated by the Federal Trade Commission under subsection (a) shall not apply to persons described in subsection (f)(1) of section 6 of the Commodity Exchange Act (7 U.S.C. 8, 9, 15, 13b, 9a).

(2) [Omitted]

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6103 (2005)

§ 6103. Actions by States

(a) In general. Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 3 [15 USCS § 6102], the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice. The State shall serve prior written notice of any civil action under subsection (a) or (f)(2) upon the Commission and provide the Commission with a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State shall serve such notice immediately upon instituting such action. Upon receiving a notice respecting a civil action, the Commission shall have the right (1) to intervene in such action, (2) upon so intervening, to be heard on all matters arising therein, and (3) to file petitions for appeal.

(c) Construction. For purposes of bringing any civil action under subsection (a), nothing in this Act shall prevent an attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to

compel the attendance of witnesses or the production of documentary and other evidence.

(d) Actions by the Commission. Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 3 [15 USCS § 6102], no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) or (f)(2) against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(e) Venue; service of process. Any civil action brought under subsection (a) in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of title 28, United States Code. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

(f) Actions by other State officials.

(1) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

(2) In addition to actions brought by an attorney general of a State under subsection (a), such an action may be brought by officers of such State who are authorized by the State to bring actions in such State on behalf of its residents.

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6104 (2005)

§ 6104. Actions by private persons

(a) In general. Any person adversely affected by any pattern or practice of telemarketing which violates any rule of the Commission under section 3 [15 USCS § 6102], or an authorized person acting on such person's behalf, may, within 3 years after discovery of the violation, bring a civil action in an appropriate district court of the United States against a person who has engaged or is engaging in such pattern or practice of telemarketing if the amount in controversy exceeds the sum or value of $ 50,000 in actual damages for each person adversely affected by such telemarketing. Such an action may be brought to enjoin such telemarketing, to enforce compliance with any rule of the Commission under section 3 [15 USCS § 6102], to obtain damages, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice. The plaintiff shall serve prior written notice of the action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the person shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(c) Action by the Commission. Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 3 [15 USCS § 6102], no person may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil

action against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(d) Cost and fees. The court, in issuing any final order in any action brought under subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

(e) Construction. Nothing in this section shall restrict any right which any person may have under any statute or common law.

(f) Venue; service of process. Any civil action brought under subsection (a) in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of title 28, United States Code. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

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CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6105 (2005)

§ 6105. Administration and applicability of Act

(a) In general. Except as otherwise provided in sections 3(d), 3(e), 4, and 5 [15 USCS §§ 6102(d), (e), 6103, and 6104], this Act shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this Act.

(b) Actions by the Commission. The Commission shall prevent any person from violating a rule of the Commission under section 3 [15 USCS § 6102] in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*) were incorporated into and made a part of this Act.

(c) Effect on other laws. Nothing contained in this Act shall be construed to limit the authority of the Commission under any other provision of law.

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6106 (2005)

§ 6106. Definitions

For purposes of this Act:

(1) The term "attorney general" means the chief legal officer of a State.

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which—

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or illustrations, and

(D) has been issued not less frequently than once a year,

where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6107 (2005)

§ 6107. Enforcement of orders

(a) General authority. Subject to subsections (b) and (c), the Federal Trade Commission may bring a criminal contempt action for violations of orders of the Commission obtained in cases brought under section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(b) Appointment. An action authorized by subsection (a) may be brought by the Federal Trade Commission only after, and pursuant to, the appointment by the Attorney General of an attorney employed by the Commission, as a special assistant United States Attorney.

(c) Request for appointment.

(1) Appointment upon request or motion. A special assistant United States Attorney may be appointed under subsection (b) upon the request of the Federal Trade Commission or the court which has entered the order for which contempt is sought or upon the Attorney General's own motion.

(2) Timing. The Attorney General shall act upon any request made under paragraph (1) within 45 days of the receipt of the request.

(d) Termination of authority. The authority of the Federal Trade Commission to bring a criminal contempt action under subsection (a) expires 2 years after the date of the first promulgation of rules under section 3 [15 USCS § 6102]. The expiration of such authority shall have no effect on an action brought before the expiration date.

TITLE 15.—COMMERCE AND TRADE
CHAPTER 87.—TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

15 USCS § 6108 (2005)

§ 6108. Review

Upon the expiration of 5 years following the date of the first promulgation of rules under section 3 [15 USCS § 6102], the Commission shall review the implementation of this Act and its effect on deceptive telemarketing acts or practices and report the results of the review to the Congress.

APPENDIX E

TITLE 16—COMMERCIAL PRACTICES
CHAPTER I—FEDERAL TRADE COMMISSION
SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS
PART 310—TELEMARKETING SALES RULE

16 CFR 310.1

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

TITLE 16—COMMERCIAL PRACTICES
CHAPTER I—FEDERAL TRADE COMMISSION
SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS
PART 310—TELEMARKETING SALES RULE

16 CFR 310.2

§ 310.2 Definitions.

(a) Acquirer means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) Attorney General means the chief legal officer of a state.

(c) Billing information means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) Caller identification service means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) Charitable contribution means any donation or gift of money or any other thing of value.

(g) Commission means the Federal Trade Commission.

(h) Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) Credit card sales draft means any record or evidence of a credit card transaction.

(k) Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) Customer means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) Donor means any person solicited to make a charitable contribution.

(n) Established business relationship means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) Free-to-pay conversion means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) Investment opportunity means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) Material means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) Merchant means a person who is authorized under a written contrac with an acquirer to honor or accept credit cards, or to tansmit or process for payment credit card payments, for he purchase of goods or services or a charitable contributon.

(s) Merchantagreement means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) Negativeoption feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to rejectgoods or services or to cancel the agreement is interpreted by he seller as acceptance of the offer.

(u) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) Person means any individual, group, unincorporated association, linited or general partnership, corporation, or other businessentity.

(w) Preacquired account information means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or

donor during the telemarketing transaction pursuant to which the account will be charged.

(x) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) Prize promotion means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) State means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year,

when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) Upselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

TITLE 16—COMMERCIAL PRACTICES
CHAPTER I—FEDERAL TRADE COMMISSION
SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS
PART 310—TELEMARKETING SALES RULE

16 CFR 310.3

§ 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, can-

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[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

cellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase o-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit

card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or

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[3] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in § § 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) Assisting and facilitating. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) Credit card laundering. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) Prohibited deceptive acts or practices in the solicitation of charitable contributions. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

TITLE 16—COMMERCIAL PRACTICES
CHAPTER I—FEDERAL TRADE COMMISSION
SUBCHAPTER C—REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS
PART 310—TELEMARKETING SALES RULE

16 CFR 310.4

§ 310.4 Abusive telemarketing acts or practices.

[PUBLISHER'S NOTE: Paragraph (b)(3)(iv) was revised at 69 FR 16368, 16373, Mar. 29, 2004, effective Jan. 1, 2005. For the convenience of the user, paragraph (b)(3)(iv) has been set out twice below. The first version is effective until Jan. 1, 2005. The second version is effective Jan. 1, 2005.]

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) Pattern of calls. (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with

intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[6] of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

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[6] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(i) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i)

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) [Effective until Jan. 1, 2005.] The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(iv) [Effective Jan. 1, 2005.] The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7]; and

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[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase o-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) Required oral disclosures in charitable solicitations. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

TITLE 16—COMMERCIAL PRACTICES
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PART 310—TELEMARKETING SALES RULE

16 CFR 310.5

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $ 25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

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16 CFR 310.6

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, provided, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, provided, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

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16 CFR 310.7

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

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16 CFR 310.8

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $40 per area code of data accessed, up to a maximum of $11,000; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $40 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $20 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the

National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

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16 CFR 310.9

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(3)

Supreme Court, U.S.
FILED
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No. 05-927

In the Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Telemarketing Sales Rule, 16 C.F.R. Pt. 310, which imposes restrictions and disclosure requirements on telemarketing calls, violates the First Amendment because it covers for-profit telefunders that solicit charitable contributions.

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In the Supreme Court of the United States

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FEDERAL TRADE COMMISSION

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-42a) is reported at 420 F.3d 331. The opinion of the district court (Pet. App. 44a-70a) is reported at 303 F. Supp. 2d 707.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2005. A petition for rehearing was denied on October 25, 2005 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act or Act), Pub. L. No. 103-297, 108 Stat. 1545 (15 U.S.C. 6101 *et seq.*). The Act is designed to combat "[i]nterstate telemarketing fraud" and "other forms of telemarketing deception and abuse." 15 U.S.C. 6101. The Act requires the Federal Trade Commission (FTC or Commission) to "prescribe rules prohibiting deceptive * * * and other abusive telemarketing acts or practices." 15 U.S.C. 6102(a)(1). Those rules must include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," as well as restrictions on the hours of the day during which such calls are permitted, and certain disclosure requirements. 15 U.S.C. 6102(a)(3) (2000 & Supp. II 2002). As originally enacted, the Telemarketing Act limited the definition of "telemarketing" to calls seeking "to induce purchases of goods or services." 15 U.S.C. 6106(4).

The Commission's jurisdiction under the Telemarketing Act is coextensive with its jurisdiction under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* See 15 U.S.C. 6105(a). Its jurisdiction under the FTC Act excludes many non-profit entities. See 15 U.S.C. 44, 45(a)(2). The Commission also lacks jurisdiction over certain for-profit entities that are subject to other regulatory regimes, including banks, savings and loan institutions, federal credit unions, common carriers, and entities engaged in "the business of insurance." 15 U.S.C. 45(a)(2), 1012(b). If the Commission has jurisdiction over a particular entity, the Commission retains that jurisdiction even if the entity is acting on behalf of another entity over which the Commission does not have

jurisdiction. See, *e.g.*, *Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920, 923 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981).

In 1995, the FTC promulgated its original Telemarketing Sales Rule (TSR or Rule) to implement the Telemarketing Act. 60 Fed. Reg. 43,842 (16 C.F.R. Pt. 310 (2003)). The Rule prohibited various deceptive telemarketing practices (16 C.F.R. 310.3 (2003)), as well as certain abusive practices (16 C.F.R. 310.4 (2003)), such as calling a consumer who has stated that he does not wish to be called by a particular seller (the company-specific "do-not-call" provision), and imposed time restrictions and disclosure requirements. In keeping with the statutory definition of "telemarketing" in effect at the time, 15 U.S.C. 6106(4), the Rule applied only to telephone calls conducted to induce the purchase of goods or services (see 16 C.F.R. 310.2(u) (2003)).

In October 2001, Congress enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 396. Section 1011 of the USA PATRIOT Act amended the Telemarketing Act by expanding the definition of "telemarketing," 15 U.S.C. 6106(4) (2000 & Supp. II 2002), to cover any "plan, program, or campaign which is conducted to induce * * * a charitable contribution, donation, or gift of money or any other thing of value." Section 1011 did not, however, expand the Commission's jurisdiction over entities not otherwise subject to the FTC Act and the Telemarketing Act.

In January 2002, the Commission issued a notice of proposed rulemaking to consider amending the TSR to reflect, among other things, the enactment of the USA PATRIOT Act. 67 Fed. Reg. 4492. In January 2003, after considering thousands of comments and conducting a public forum, the Commission issued an amended TSR. 68 Fed. Reg. 4580. Based on the 2001 statutory

amendments and the rulemaking record, the Commission extended the coverage of the TSR to telefunders, for-profit entities that solicit charitable contributions on behalf of non-profit organizations. *Id.* at 4584-4586. The Commission rejected the contention "that no privacy protection measures are necessary with respect to charitable solicitation telemarketing," because the Commission concluded that charitable solicitations can interfere with residential peace. *Id.* at 4637 & n.685. The Commission stated that, although "the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible," *id.* at 4586, the Act authorized the Commission to prevent telefunders from engaging in deceptive or abusive practices. *Id.* at 4585.

The Commission applied most, but not all, of the Rule's restrictions to telefunders. In particular, the Commission exempted telefunders from the national "do-not-call" registry established by the amended Rule for commercial telemarketing. 16 C.F.R. 310.6(a). The Commission explained that the exemption was warranted because compliance by telefunders with the more modest entity-specific "do-not-call" provision should provide sufficient consumer protection and because the exemption would minimize the impact of the Rule on the First Amendment rights of telefunders and the charities that hire them. 68 Fed. Reg. at 4636-4637.

In order to protect consumers from abusive solicitation practices, however, the Commission subjected telefunders to many of the generally applicable provisions of the TSR. Those provisions include:

(1) the entity-specific "do-not-call" provision, 16 C.F.R. 310.4(b)(1)(iii)(A), which prohibits a telemarketer from calling any consumer who has indicated that he wants no further calls from or on

behalf of the particular seller or non-profit organization;

(2) the prohibition on abandoned (and recorded) calls, 16 C.F.R. 310.4(b)(1)(iv), which requires the telemarketer to connect each call to a representative within two seconds of the recipient's completed greeting;

(3) the prohibition on placing calls before 8 a.m. or after 9 p.m., 16 C.F.R. 310.4(c);

(4) the requirement that telemarketers transmit caller identification information, 16 C.F.R. 310.4(a)(7); and

(5) a requirement that telefunders promptly indicate that the purpose of the call is to solicit charitable contributions and identify the charity on behalf of whom they are soliciting, 16 C.F.R. 310.4(e).

b. The Commission's authority under the Telemarketing Act overlaps with authority provided to the Federal Communications Commission (FCC) under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227. Among other things, the TCPA directs the FCC to issue rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," 47 U.S.C. 227(c)(1), and also prohibits most prerecorded calls to residential phone lines with a few exceptions, 47 U.S.C. 227(b)(1)(B). The definition of "telephone solicitation" under the TCPA specifically exempts calls "by a tax exempt nonprofit organization." 47 U.S.C. 227(a)(3).

In July 2003, the FCC issued revised TCPA rules that are nearly identical to the Commission's TSR, including the "do-not-call" requirements, the abandoned call provisions, the time restrictions, and the disclosure and

caller identification provisions. See *In re Rules and Regulations Implementing the TCPA (In re TCPA)*, 18 F.C.C.R. 14,014 (2003). The FCC's amended rule subjects all commercial entities to its requirements, including for-profit entities exempt from the FTC's jurisdiction. *In re TCPA*, 18 F.C.C.R. 18,558, 18,560 (2003). The FCC retained regulatory provisions, however, that exempt from coverage solicitations by both non-profit organizations themselves and their for-profit telefunders. 68 Fed. Reg. at 44,161.

2. Petitioners National Federation of the Blind and Special Olympics Maryland, Inc., are both tax-exempt non-profit organizations that hire telefunders to solicit charitable contributions for them. Pet. App. 49a. In April 2003, petitioners filed suit for declaratory and injunctive relief against the FTC in the United States District Court for the District of Maryland. As relevant here, petitioners contended that the five provisions of the amended TSR described above, pp. 4-5, *supra*, violate the First Amendment to the Constitution. Pet. App. 8a, 49a.

The district court granted the Commission's motion for summary judgment. Pet. App. 43a-70a. The court held, *inter alia*, that the modest restrictions imposed by the TSR comport fully with the First Amendment. *Id.* at 55a-68a.

The court of appeals affirmed the district court's judgment. Pet. App. 2a-42a. The court held that the TSR does not violate the First Amendment because it is a "reasonable regulation" that is "narrowly drawn" to serve "sufficiently strong subordinating interest[s] that the [government] is entitled to protect"—namely preventing fraud and protecting home privacy. Pet. App. 3a (quoting *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 960-961 (1984)). Analyzing each of the

challenged TSR provisions in turn (Pet. App. 15a-23a), the court concluded that they are the "most reasonable and minor restrictions on telemarketing practices." *Id.* at 20a. For example, the court held that the charity-specific do-not-call provision is narrowly tailored because "it restricts only calls that are targeted at unwilling recipients," and it requires recipients to object to calls on a charity-by-charity basis. *Id.* at 17a-18a (quoting *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228, 1242 (10th Cir.), cert. denied, 543 U.S. 812 (2004)). The court distinguished the present case from this Court's decisions in *Munson*, *supra*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1986), which held unconstitutional "blunt and broad" state laws that limited fundraising fees. Pet. App. 20a. The court of appeals explained that the laws invalidated in those cases were insufficiently tailored to prevent fraud, whereas the challenged TSR provisions "are carefully crafted" to prevent fraud and to protect privacy. *Id.* at 21a.

The court of appeals also rejected petitioners' argument that the TSR is unconstitutionally under-inclusive because it covers calls by telefunders but not direct solicitations by charities themselves. Pet. App. 23a-30a. The court concluded that the purported under-inclusiveness in the TSR "is justified by a neutral and legitimate reason"—the Commission's jurisdictional limitations. *Id.* at 24a; see *id.* at 26a-29a. The court reasoned that those jurisdictional boundaries do not raise any "red flag[s] indicating First Amendment problems," such as an attempt to favor one side of a public debate, the pursuit of an illegitimate government interest, or the failure genuinely to serve the interest that the challenged regulation is designed to advance. *Id.* at 28a.

The court noted that the "TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." *Id.* at 32a. The court therefore concluded that the Rule is consistent with the First Amendment. *Id.* at 33a.

Judge Duncan dissented. Pet. App 34a-42a. Relying on *Riley*, *supra*, and *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), she reasoned that the TSR is unconstitutionally under-inclusive because it covers telefunders but not in-house charity callers. Pet. App. 34a-37a. Unpersuaded that there is a legitimate justification for that distinction, she concluded that the Rule violates the First Amendment. *Id.* at 37a-42a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. Although professional fundraising on behalf of charities enjoys some First Amendment protection, this Court has consistently held that speech "[s]oliciting financial support is undoubtedly subject to reasonable regulation." *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-796 (1988); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 959-960 (1984). The government may impose content-neutral regulations on charitable fundraising if the regulations serve "sufficiently strong, subordi-

nating interest[s] that the [government] is entitled to protect" and are "narrowly drawn * * * to serve [the] interes[ts] without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg*, 444 U.S. at 636-637). The TSR provisions challenged by petitioners easily pass that test.[1]

Petitioners incorrectly assert (Pet. 16-18) that the TSR's restrictions are "substantial burdens" on speech. On the contrary, as the court of appeals explained, the Rule's provisions are narrowly tailored to further important governmental interests. Pet. App. 15a-23a. Most of the challenged provisions impose modest limitations on telemarketing calls in order to protect residential privacy, which this Court has recognized as an interest "of the highest order in a free and civilized society." *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey* v.

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[1] Petitioners incorrectly contend (Pet. 10) that the TSR is not content-neutral. In general, a regulation is content-neutral unless "the government has adopted [the] regulation because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The TSR was clearly not adopted for such a purpose. As the court of appeals explained, "the TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." Pet. App. 32a. Petitioners appear to argue that the TSR is not content-neutral based on the supposition that its restrictions are more likely to affect small or unpopular charities. Pet. 10-11. Petitioners provide no support for that supposition, but it is irrelevant in any event. As explained above, the TSR "serves purposes unrelated to the content of expression"—the protection of privacy and the prevention of fraud—and it is therefore "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Brown, 447 U.S. 455, 471 (1980)). For example, the prohibition on calls early in the morning or late at night enables families to enjoy a few uninterrupted hours at home but still permits a generous thirteen hours each day for solicitations. 16 C.F.R. 310.4(c). Similarly, the restriction on abandoned calls, 16 C.F.R. 310.4(b)(1)(iv), protects households from an intrusion that the Commission found, based on extensive public comment, to be particularly severe. Abandoned calls not only waste consumers' time but also frighten some consumers, who become concerned that they are being monitored by stalkers or burglars. 68 Fed. Reg. at 4641-4643.

Other provisions of the TSR simply give individual households the choice to restrict unwelcome solicitations. The entity-specific do-not-call provision enables consumers to indicate that they do not wish to receive additional calls on behalf of a particular charity. 16 C.F.R. 310.4(b)(1)(iii)(A). Similarly, the provision requiring telemarketers to transmit their caller identification information gives households the opportunity to screen solicitation calls and either accept or ignore the calls as they see fit. 16 C.F.R. 310.4(a)(7); see 68 Fed. Reg. at 4627. The Court has repeatedly approved regulations of this type, which allow individuals to opt in to limitations on speech, because they are a far more narrowly tailored means of protecting privacy than absolute prohibitions on speech. See *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737-738 (1970) (upholding law permitting residents to bar mailings that they consider to be provocative); *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 168-169 (2002) (recognizing validity of law permitting enforcement of "no solicitation" signs posted by residents); *United States* v. *Playboy Entm't Group, Inc.*,

529 U.S. 803, 815 (2000) (targeted blocking by consumer less restrictive than government ban on speech).

The fifth provision challenged by petitioners requires telefunders to identify the charity on whose behalf they are calling and the purpose of the call. 16 C.F.R. 310.4(e). As the court of appeals explained, that provision is narrowly tailored to further the government's substantial interest in preventing fraud. Pet. App. 19a. The required disclosures permit consumers to make informed decisions about their charitable donations, including whether to invoke the entity-specific do-not-call provision. See *Illinois* v. *Telemktg. Assocs., Inc.*, 538 U.S. 600, 623 (2003). This Court has upheld substantially broader disclosure requirements in order to prevent charitable solicitation fraud. See *Riley*, 487 U.S. at 799 n.11, 800 (professional fundraisers may be required to disclose their "professional status," and a State may publish their "detailed financial disclosure forms"); *Munson*, 467 U.S. at 961-962 n.9 (upholding law requiring charity to disclose its finances).[2]

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[2] Petitioners incorrectly contend (Pet. 16, 17, 19) that the TSR can pass muster under the First Amendment only if it is "the least restrictive means" to further the government's interests. This Court has never imposed that level of scrutiny on laws regulating professional fundraising for charities. Instead, the Court has required only that the regulations be "narrowly drawn" to serve a "sufficiently strong, subordinating interest." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg*, 444 U.S. at 636-637). Cf. *Ward*, 491 U.S. at 797-799 & n.6 (rejecting assertion that narrow tailoring requirement mandates least-restrictive-means analysis of content-neutral time, place, and manner restrictions). In any event, the challenged TSR provisions satisfy the strict scrutiny advocated by petitioners. Protecting the privacy of the home and preventing fraud are compelling state interests, and the TSR's provisions directly advance those interests by imposing only the most minimal limitations on speech. Any less restrictive alternatives (such as

2. Petitioners mistakenly argue (Pet. 6-16, 18-19) that the TSR violates the First Amendment because it is under-inclusive. Petitioners' primary complaint is that the TSR covers telefunders but not solicitation calls made directly by charities themselves. As the court of appeals explained, however, that limitation on the scope of the TSR is "justified by a neutral and legitimate reason"—the FTC's limited jurisdiction. Pet. App. 24a; see *id.* at 26a-29a. And the limits on the FTC's jurisdiction present no First Amendment concerns. See *id.* at 32a.

"There is no mystery * * * about why the FTC has distinguished telefunders from in-house charity callers." Pet. App. 26a. The Commission has no jurisdiction over charitable organizations, and it therefore lacks authority to subject them to the TSR. See 68 Fed. Reg. at 4586-4587. At the same time, in the USA PATRIOT Act, Congress unambiguously directed the FTC to use the authority that it does possess to prevent abusive charitable solicitations. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002). The FTC therefore included for-profit telefunders within the coverage of the TSR, just as the FTC included other for-profit entities that are subject to its jurisdiction. 68 Fed. Reg. at 4585. The FTC's decision to regulate all entities over which it has jurisdiction, but only those entities, does not reflect discrimination against any category of speech or group of speakers. On the contrary, the FTC's jurisdictional constraints provide a "neutral justification" for the scope of the TSR. Pet. App. 28a (quoting *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993)).

Petitioners contend (Pet. 12, 15-16) that the First Amendment does not permit Congress to subject

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permitting late night calls or calls from persons who refuse to identify themselves) would leave consumers vulnerable to abuse or fraud.

telefunders to the telemarketing protections of the TSR unless it also expands the FTC's jurisdiction to cover in-house charity callers. But it is perfectly reasonable for Congress to distinguish between solicitations by professional fundraisers and solicitations by charities themselves. That distinction reflects the common-sense judgment that for-profit solicitors are more likely to engage in abusive or coercive telemarketing behavior because their compensation depends on the level of contributions they solicit. Several courts have recognized the validity of that judgment in upholding solicitation laws that exempt in-house charity callers. See *Fraternal Order of Police, N.D. State Lodge* v. *Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005) (deferring to legislative judgment "that professional charitable solicitors intrude more regularly on residents' privacy than [the charity's] volunteers or employees"), petition for cert. pending, No. 05-1149 (filed Mar. 6, 2006); *National Coalition of Prayer, Inc.* v. *Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *12-*13 (S.D. Ind. Sept. 2, 2005) (same), appeal docketed, No. 05-3995 (7th Cir. Oct. 14, 2005); *Special Programs, Inc.* v. *Courter*, 923 F. Supp. 851, 860 (E.D. Va. 1996) (same); *Lucas* v. *Curran*, 856 F. Supp. 260, 273 (D. Md. 1994) (same).

This Court has also recognized that the government may impose narrowly tailored restrictions on telefunders without imposing those restrictions on charities. As noted above, in *Riley*, the Court expressly approved laws that required fundraisers to disclose their "professional status" and provided for publication of the amount of money that the fundraisers turned over to the charities for which they solicited, because those laws are narrowly tailored to prevent telefunder fraud. *Riley*, 487 U.S. at 795, 799 n.11, 800.

There is thus no merit to petitioners' contention (Pet. 8-9, 12, 18-19) that this Court—in *Riley*, *Schaumburg*, and *Munson*—categorically rejected any connection between the paid status of a telefunder and fraud. Rather, in those cases, the Court struck down laws that presumed that solicitations were fraudulent based solely on the percentage of funds retained by the solicitor, because those laws only "peripherally promoted" the government's interest in preventing fraud. *Schaumburg*, 444 U.S. at 636; see *Riley*, 487 U.S. at 788-789; *Munson*, 467 U.S. at 966-967. At the same time, the Court recognized that the "interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation" imposed on professional fundraisers. *Riley*, 487 U.S. at 792.

Petitioners also err in contending that *Riley* holds that laws directed at telefunders but not charities themselves "'necessarily' discriminate against small or unpopular charities." Pet. 10-11; see Pet. 6. One of the laws held unconstitutional in *Riley* required professional fundraisers, during the solicitation and before the appeal for funds, to disclose the amount of money that they turned over in the previous year to the charities for which they solicited. The Court reasoned that this disclosure requirement would so prejudice "legitimate" fundraising efforts that it would "discriminate[]" against charities that hire professional fundraisers. 487 U.S. at 799. But the Court did not rule that *all* limitations directed only at professional fundraisers are discriminatory and unconstitutional. On the contrary, as noted above, the Court expressly approved several limitations of that kind because they were narrowly tailored to address legitimate governmental interests. See *id.* at 795, 799 n.11, 800. The TSR's modest strictures, including

the requirement that telefunders disclose the identity of the charity for which they are soliciting and the purpose of the call, are the sort of narrowly tailored regulations approved in *Riley*. See *id.* at 799 n.11.

Petitioners are also mistaken in asserting (Pet. 7, 9, 12, 19) that the decision below conflicts with *Discovery Network*. That case involved a city's ban on newsracks dispensing commercial handbills, but not newsracks dispensing newspapers, for the purported purpose of promoting esthetics and pubic safety. The Court struck down the ban, which covered approximately 4% of the city's newsracks, because it made only a "minute" or "paltry" contribution to the city's goals. 507 U.S. at 417-418. The Court also noted that the city proffered "no justification" for its distinction between commercial newsracks and newspaper racks other than a "naked assertion that commercial speech has 'low value.'" *Id.* at 429. In sharp contrast to the "paltry" manner in which the law at issue in *Discovery Network* furthered the government's asserted interests, the TSR's application to telefunders directly and significantly furthers the protection of privacy and the prevention of fraud by, for example, restricting early-morning and late-night calls, eliminating menacing hang-up calls, and requiring basic disclosures about the purpose of solicitations. Moreover, as discussed above, distinguishing between telefunders and in-house charity callers is entirely reasonable. See p. 13, *supra*.

3. Petitioners also object (Pet. 7, 14, 18-19) to other exemptions in the TSR that they contend render it impermissibly under-inclusive. There are, however, legitimate reasons for all of those exemptions. In each case, the entity or speech exempted from the TSR is either subject to another federal law protecting consum-

ers or does not pose the same risk of overreaching or harassment as calls by telefunders.

First, all commercial telemarketers that are not covered by the TSR are fully covered by the FCC's TCPA rules, which are virtually identical in all relevant respects to the TSR. See *In re TCPA*, 18 F.C.C.R. at 14,034; *id.* at 14,138-14,139. Similarly, intrastate calls are covered by the FCC's parallel TCPA rules. See 47 U.S.C. 152(b); *In re TCPA*, 18 F.C.C.R. at 14,028; *id.* at 14,138-14,139.

Second, the TSR does not cover political fundraising because political solicitations are neither commercial nor charitable telemarketing and therefore do not fall within the terms of the Telemarketing Act. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002); 68 Fed. Reg. at 4589 & n.106. Laws regulating political speech pose unique First Amendment concerns. See *Burson* v. *Freeman*, 504 U.S. 191, 196 (1992); *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988). Congress has therefore decided to regulate political fundraising under a separate regime, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, administered by a separate agency, the Federal Election Commission, which has expertise in the area. That decision does not render the TSR constitutionally suspect.

Finally, Congress's decision not to regulate calls that do not solicit funds, such as education or advocacy calls, is also reasonable. Those calls do not pose the same concerns as fundraising calls. See *Hill* v. *Colorado*, 530 U.S. 703, 723-724 (2000) (upholding a statute against a charge of under-inclusiveness because the speech it permitted was not "similarly likely to raise the legitimate concerns to which [the statute] respond[ed]"); *United States* v. *Kokinda*, 497 U.S. 720 (1990) (upholding a reg-

ulation that restricted solicitations, but not other forms of expression).

4. Petitioners do not—and could not—contend that this Court's review is necessary to resolve any split of authority among the courts of appeals. The courts of appeals have consistently upheld the TSR, as well as analogous state charitable solicitation laws. Many of those state laws contain exemptions for in-house charity callers, political solicitations, and other types of speech or speakers similar to the exemptions in the TSR.

For example, the Eighth Circuit recently upheld a state do-not-call law that applies to charitable solicitations but exempts in-house charity callers, advocacy calls, political fundraising calls, and calls to persons with a prior business relationship. *Stenehjem*, 431 F.3d at 596-599; see also *National Fed'n of the Blind of Ark., Inc.* v. *Pryor*, 258 F.3d 851, 855 n.3, 857 (8th Cir. 2001) (upholding law that regulates charitable and commercial solicitations but not political solicitations or advocacy calls). Other courts of appeals have likewise upheld state laws restricting charitable solicitations or imposing disclosure requirements that contain similar exemptions from coverage. See *American Target Adver., Inc.* v. *Giani*, 199 F.3d 1241, 1248-1249 (10th Cir.) (upholding disclosure and other requirements imposed only on professional charitable fundraisers), cert. denied, 531 U.S. 811 (2000); *Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1481-1482, 1485 (6th Cir. 1995) (upholding law requiring various disclosures by charitable fundraisers and containing various exemptions), cert. denied, 517 U.S. 1135 (1996); *Auburn Police Union* v. *Carpenter*, 8 F.3d 886, 901 (1st Cir. 1993) (upholding law prohibiting solicitations benefitting police officers and containing an exemption for campaign speech), cert. denied, 511 U.S. 1069 (1994).

Finally, the Tenth Circuit recently rejected a First Amendment challenge to the national TSR do-not-call registry, which, as noted above, applies to commercial but not charitable telemarketing. *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228 (10th Cir.), cert. denied, 543 U.S. 812 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

No. 05-927

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

Pursuant to Supreme Court Rule 15, Petitioners National Federation of the Blind and Special Olympics Maryland, Inc. ("Petitioners") respectfully submit this "Reply Brief Supporting Petition for a Writ of Certiorari" to (A) request that the Court consider this Petition concurrently with the "Petition for a Writ of Certiorari" filed in the matter entitled *Fraternal Order of Police et al. v. Stenehjem*, 431 F.3d 591 (2005), Case No. 05-1149; and (B) address matters newly raised in the "Brief for the Federal Trade Commission in Opposition" (the "Opposition") filed on behalf of the Federal Trade Commission (the "FTC").

ARGUMENT

A. The Court Should Consider This Petition Concurrently With the Petition for a Writ of Certiorari Regarding *Fraternal Order of Police*.

In the Opposition, the FTC relies upon the recent decision of the Eighth Circuit in *Fraternal Order of Police et al. v. Stenehjem*, 431 F.3d 591 (2005). *See* Opposition p. 13 (citing *Fraternal Order of Police* for the proposition that "several courts have recognized the validity of that [common sense] judgment in upholding solicitation laws that exempt in-house charity callers") and p. 17 (noting that "the Eighth Circuit recently upheld a state do-not-call law that applies to charitable solicitations but exempts in-house charity callers, advocacy calls, political fundraising calls, and calls to persons with a prior business relationship.")

Both this case and *Fraternal Order of Police* involve the constitutionality of *charitable speech restrictions that apply to charities using professional fundraisers to solicit by telephone, but do not apply to charities using volunteer fundraisers to solicit by telephone.* In this case, the Fourth Circuit has upheld the application of certain provisions of the FTC's Telemarketing Sales Rule (including the entity specific do-not-call provision, calling time restrictions, a requirement that telefunders transmit caller-ID information and promptly identify the call as a solicitation, and a prohibition on abandoned calls) to charities using professional fundraisers. In *Fraternal Order of Police*, the Eighth Circuit has upheld the application the national do-not-call registry to charities using professional fundraisers in North Dakota. Charities using volunteer fundraisers are exempt from the charitable speech restrictions at issue in these cases.

Because these cases present similar issues, Petitioners request that the Petitions be considered together, and that review be granted in both cases.[1]

B. A Congressional Act Cannot Constitute "Neutral Justification" for the Abridgement of Free Speech.

In the Opposition, the FTC argues that its lack of jurisdiction over charities constitutes a "neutral justification" for its disparate treatment of charities using professional fundraisers, stating:

> 'There is no mystery . . . about why the FTC has distinguished telefunders from in-house charity callers.' [Citation.] The Commission has no jurisdiction over charitable organizations, and it therefore lacks authority to subject them to the TSR." *See* Opposition, p. 12.
>
> "On the contrary, the FTC's jurisdictional constraints provide a 'neutral justification' for the scope of the TSR." *See* Opposition, p. 12.

Absent an amendment to the Constitution, a federal agency's jurisdictional limitations cannot constitute a "neutral justification" justifying impairment of the freedom of speech under the First Amendment. The First Amendment expressly states: "*Congress shall make no law . . . abridging the*

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[1] These cases exemplify the different regulations of charitable telephone solicitation being imposed by the FTC, FCC and various states. Reviewing courts are reaching inconsistent results. As pointed out by Amicus Veterans First, in upholding the constitutionality of the national do-not-call registry as applied to core commercial speech, the Tenth Circuit noted its exemption of all charitable solicitations. *See Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004). In *Fraternal Order of Police*, the Eighth Circuit recently upheld the application of the national do-not-call registry to charitable solicitations made by professional fundraisers in North Dakota. These different rulings refute the FTC's argument that "Petitioners do not—and could not—contend that this Court's review is necessary to resolve any split of authority among the courts of appeals." *See* Opposition, p. 17.

freedom of speech, or of the press. . . ." *See* United States Constitution, First Amendment.

The jurisdiction of a federal agency, including the FTC, is established by an Act of Congress. In the Opposition, p. 2, the FTC explains: "The FTC's jurisdiction under the Telemarketing Act is coextensive with its jurisdiction under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq*. See 15 U.S.C. 6105(a). Its jurisdiction under the FTC Act excludes many non-profit entities. See 15 U.S.C. 44, 45(a)(2)."

If the FTC's jurisdictional limitations abridge a charity's rights under the First Amendment, they are unconstitutional. Moreover, permitting the FTC to use its jurisdiction as "neutral justification" for abridging speech is tantamount to arguing that *any Congressional Act can be a "neutral justification" justifying the abridgment of freedom of speech*. The First Amendment would be completely eviscerated by allowing a Congressional Act to serve as "neutral justification" justifying the abridgement of free speech.

C. The FTC's Regulations are Content-Based Speech Restrictions.

In the Opposition, the FTC argues that the challenged regulations are content-neutral because: "The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the called" (*see* Opposition, p. 8, and p. 9, n.1) and "the TSR 'serves purposes unrelated to the content of expression'—the protection of privacy and the prevention of fraud—and it is therefore 'deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" Opposition, p. 9, n.1.

These arguments miss the mark. The challenged regulations are content-based. Among other things, the underlying

definition of "telemarketing" contained in the TSR—"a plan, program or campaign which is conducted to induce . . . a charitable contribution . . ."— is so vague and overbroad that it gives the government virtually unfettered authority to determine, *based upon the content of the speech*, whether a call is "conducted to induce" a contribution. Based on the content of a call, the TSR requires the FTC to decide, for example, whether a series of calls only providing information and never mentioning a request for a contribution is actually conducted to "induce" a charitable contribution. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-153 (1969) (discussing the unconstitutionality of a statute which "conferred upon the City Commission virtually unbridled and absolute power to prohibit any parade, procession, or demonstration on the city's streets or public ways").

D. The FTC Admits the Absence of any Evidentiary Basis for the Fourth Circuit's Decision.

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993), this Court held: "It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." In this case, the FTC has utterly failed to establish the existence of any legitimate interest to be remedied, much less any "reasonable fit" between any such interest and its selective regulation of charities using professional fundraisers.

In the Opposition, the FTC admits its absence of empirical evidence supporting its selective regulation of charities using professional fundraisers. The FTC has previously used the absence of evidence of problems associated with charitable calls to justify the application of the national do-not-call registry to commercial speech. *See Mainstream Marketing Services, Inc.*, 358 F.3d at 1236-1237 (relying on the FTC's

evidence of the harassing effects of commercial speech, and the lack of similar evidence for charitable solicitations, to uphold the application of the national do-not-call registry to core commercial speech).

In the Opposition, the FTC broadly claims that "the TSR's application to telefunders directly and significantly furthers the protection of privacy and the prevention of fraud" and that "distinguishing between telefunders and in-house charity callers is entirely reasonable." *See* Opposition, p. 15.

The FTC has not identified the existence of any privacy invasions by charities using professional fundraisers, which might justify its regulations. Indeed, in 2004, the FTC declared "victory" over privacy intrusions, stating, among other things, that: "The Do Not Call Registry has made dinner time interruptions a thing of the past." *See* FTC website, press release dated June 24, 2004, entitled "National Do Not Call Celebrates One-Year Anniversary." In declaring its victory over the privacy intrusions associated with telemarketing, the FTC removed any possible rationalization—much less any "sufficiently strong, subordinating interest that the [government] is entitled to protect" (Opposition, p. 9)—for burdening the speech of charities using professional fundraisers.

Nor has the FTC identified the existence of any fraud that would be remedied by the selective regulation of calls by charities using professional fundraisers. The Supreme Court has repeatedly rejected any connection between the fact that a solicitor is paid for services and the likelihood that those services are fraudulent. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789-90 (1988), *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 476 U.S. 947, 966-67 (1984), and *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37 (1980).

Having failed to offer any evidence of any legitimate interest served by its selective regulation of charities using professional fundraisers, the FTC urges the Court to ignore its absence of evidence and to defer to its "common-sense judgment that for-profit solicitors are more likely to engage in abusive or coercive telemarketing behavior because their compensation depends on the level of contributions they solicit." *See* Opposition, p. 13. However, there is nothing "common-sense" about the leap that the FTC urges the Court to make. It is equally plausible that committed volunteers of a charity are more likely to engage in coercive solicitation because of their personal emotional stake in the charity. It is also likely that the coerciveness of a telephone solicitor depends more on the individual solicitor's temperament than on whether they are being compensated for the call.

Thus, the FTC's suggestion that professional solicitors are more likely to engage in coercive solicitation is not a "common-sense judgment;" is it sheer speculation. As pointed out in the "Amicus Brief of Veterans First in Support of Petition for a Writ of Certiorari by National Federation of the Blind," p. 5-6, such rash speculation has never been permitted to justify restrictions on constitutional freedoms. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that the government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its regulation of speech). Because there is no demonstrable need for, or effect of, the FTC's regulation of the speech or charities using professional fundraisers, the regulations should be stricken.

E. The FTC Failed to Address the Equal Protection Argument.

The regulations at issue in this case violate the constitutional promise of equal protection. *See* "Amicus Brief of Veterans First in Support of Petition for a Writ of Certiorari

by National Federation of the Blind." In its Opposition, the FTC has failed to address the equal protection violations associated with the challenged regulations.

The FTC's argument in its Opposition that its jurisdictional limitations justifies its disparate treatment of charities using professional fundraisers flies in the face of the Fourteenth Amendment, as applied to the federal government under the Fifth Amendment. *See Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995). The Fourteenth Amendment expressly provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See United States Constitution, Fourteenth Amendment.

As discussed above, jurisdictional limitations, including the jurisdictional limitations of the FTC, are created by Acts of Congress. *See* Opposition, p. 2. Allowing Congress deny equal protection simply by making a law defining a federal agency's jurisdiction is exactly what is proscribed by the Fourteenth (and Fifth) Amendment, and is patently unconstitutional.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that the Court consider the Petition in this action concurrently with the Petition for a Writ of Certiorari in the *Fraternal Order of Police*, Case No. 05-1149 and grant both Petitions.

Respectfully submitted,

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AMICUS BRIEF OF VETERANS FIRST IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY NATIONAL FEDERATION OF THE BLIND

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STATEMENT OF *AMICUS*

Amicus Veterans First is a small non-profit organization dedicated to providing Veterans in Orange County, California, with assistance in finding jobs and housing.[1] As a small charity of limited prominence, Veterans First does not have a

[1] No counsel for any of the parties below has authored the present brief, in whole or in part. In addition to Veterans First, former Board member Mark Gombar has contributed financially to Veterans First for the purpose of assisting with the expenses associated with the preparation of this brief.

sufficient infrastructure to staff education and fundraising activities of a significant scale. Accordingly, Veterans First values its right to rely as needed on outsourced telephone outreach by professional fundraisers (sometimes referred to as "telefunders"), should it ever conclude that its mission demands a greater voice. All parties to the case below have consented to the filing of the present brief by Veterans First.[2]

SUMMARY OF ARGUMENT

Wrote the dissenting member of the panel below, "[t]he implications of this holding are staggering." *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331, 354 (4th Cir. 2005) (Duncan, J., dissenting); Pet. App. 39a.

And indeed, the majority opinion below unleashes chaos on a whole series of longstanding First Amendment principles articulated by this Court. First, and as further addressed in this Brief, it guts several First Amendment safeguards, including the application of strict scrutiny review and the burden of the Government to show an evidentiary justification for speech regulation. Second, as explained by Petitioners, the Fourth Circuit's "FTC jurisdiction" rationale for imposing burdensome speech restrictions, exclusively on charities using telefunders contravenes the First Amendment requirement of neutral justification for speaker-based selective regulation of fully protected charitable speech. Essentially, the Fourth Circuit held that because an agency lacks complete jurisdiction, it is constitutional for it to underinclusively discriminate against those within its jurisdiction.[3]

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[2] True and correct copies of the consents are attached to this Amicus brief.

[3] There is no limit to the potential reach of this faulty logic. For example, this reasoning could be extended to permit the Department of Veterans Affairs to curb the constitutional speech or voting rights of veterans in a manner putting them at a disadvantage vis-à-vis other

The majority opinion below similarly eviscerates the protections of the Equal Protection clause applicable to the Federal Government through the Fifth Amendment. According to the Fourth Circuit, the Government may avoid the constitutional promise of Equal Protection simply by cleverly interpreting (or, indeed, crafting) agency jurisdictional restrictions to permit regulation of only one of two similarly situated speakers.

These constitutional infirmities of the Fourth Circuit's decision have already been embraced and taken to new extremes by a split panel of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005). In *Fraternal Order of Police*, the Eighth Circuit approved a North Dakota law enforcing the State's do-not-call list against charities using telefunders, but not to other charities—again without *any* evidence supporting the application of the State's do-not-call list to charities using telefunders or justifying the different treatment of charities. Unfortunately, the Eighth Circuit's decision is a logical extension of the constitutional errors by the majority below, and cripples the ability of small charities to conduct telephonic charitable solicitation.

In addition to its dangerous constitutional implications, as a practical matter, the Fourth Circuit's decision immediately jeopardizes the ability of smaller, resource-limited charities like Veterans First to educate the public and solicit donations, by imposing upon them added burdens that larger, more popular charities avoid, such as the maintenance of expensive company-specific do-not-call lists, calling time restrictions and additional disclosure requirements. These added burdens

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citizens; or to permit a State's Department of Social Services to require food stamp recipients to report their receipt of food stamps to prospective employers or insurers, thus placing them at a disadvantage. Permitting the Government to restrict the constitutional liberties of citizens on an agency-by-agency basis contravenes the fundamental principles of our Federal Constitution.

contravene the First and Fifth Amendments, both of which prohibit the Federal Government from discriminating arbitrarily against speech by small or less popular charities that often must engage the services of telefunders to communicate successfully with potential donors and fund their missions.

ARGUMENT

A. The Fourth Circuit Panel Majority Abandoned The Strict Scrutiny Standard Of Review Applicable To Charitable Speech Regulations Under The First Amendment

This Court and other Circuits have always applied the most exacting scrutiny to content-based regulations of charitable speech. *See, e.g., McConnell v. Federal Election Com'n*, 540 U.S. 93, 140 (2003) (noting that the Court has applied "strict scrutiny" to solicitation restrictions that require fundraisers to disclose particular information); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (noting that content-based speech restrictions always require strict scrutiny); *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1236-37 (10th Cir. 2004) (reserving the more lenient standard of intermediate scrutiny for telemarketing restrictions on commercial speech).

The Fourth Circuit's majority dismissively cast aside both the importance and the substance of the strict scrutiny standard of review. Indeed, the Fourth Circuit cavalierly shirked its responsibility to define the standard it was applying, stating: "It is unclear whether this standard amounts to 'strict scrutiny' (as the charities allege) or the less stringent 'intermediate scrutiny' (as the FTC urges). The district court believed it was applying intermediate scrutiny. . . ." *Nat'l Fed'n of the Blind*, 420 F.3d at 338 n.2; Pet. App. 12a.

The Fourth Circuit's refusal to acknowledge and apply the appropriate standard of review unavoidably invites other Courts to slacken their application of the strict scrutiny

standard and allow more extensive speech suppression than would be allowed under strict scrutiny review. This approach has already been embraced by a split panel of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*, in which the Eighth Circuit recently applied *intermediate scrutiny* to approve a North Dakota law that completely bans charitable speech by charities using professional fundraising firms, but not by other charities, to individuals registered on the State's do-not-call list. 431 F.3d 591.

The Fourth Circuit's refusal to apply strict scrutiny analysis to regulation of charitable telephone solicitation also conflicts with the decision of the Tenth Circuit in *Mainstream Marketing*, in which the Tenth Circuit applied an intermediate standard of review to uphold the constitutionality of the National do-not-call list as applied to *core commercial* calls—because the regulations did not apply to charitable calls and therefore did not require the higher level of strict scrutiny review. 358 F.3d at 1233.

B. The Fourth Circuit Panel Majority Absolved The Government From Any Evidentiary Burden To Support Charitable Speech Regulation

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entertainment*, 529 U.S. at 816-17 (citing cases).

The Fourth Circuit's decision eradicates the Government's evidentiary burden to justify its regulation of charitable speech. The decision upheld the FTC's regulation of charitable solicitation by professional solicitors—despite the FTC's admitted failure to present any evidence justifying any regulation of charitable telephone solicitations; much less any distinction among charitable speakers. The dissent noted, "[t]he FTC, when pressed at oral argument, conceded that there existed 'no *empirical evidence*' in the administrative

record to support this assumption [that a professional telefunder's financial interest in obtaining greater contribution leads it to be more likely to engage in fraudulent behavior than a non-professional solicitor]. In fact, the FTC conceded that the only evidentiary support the agency had for solely applying the TSR to telefunders was its intuitive "commonsense" ***assumption*** that telefunders commit fraud more frequently." *Nat'l Fed'n of the Blind*, 420 F.3d at 352 (Duncan, J., dissenting); Pet. App. 36a—37a (emphasis added).

This Court has never allowed the Government to justify regulation of charitable speech based upon mere "assumptions." *See Playboy Entertainment*, 529 U.S. at 819 (holding that the Government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its speech regulation); *cf. Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 624-25 (1998) (Scalia, J., concurring) (emphasizing that the First Amendment would even prohibit a Government fraud action against a professional fundraiser, but for the substantial record evidence of specific fraudulent misrepresentations). *See also Mainstream Marketing*, 358 F.3d at 1233 (relying on the FTC's evidence of the harassing effects of the commercial speech at issue, and the admitted absence of comparable evidence for charitable solicitations, to uphold the application of the national do-not-call registry to commercial callers only).

C. The Fourth Circuit Panel Majority Failed To Properly Consider, Or Apply, The Promise Of Equal Protection

"The Federal Government has a duty under the Due Process Clause of the Fifth Amendment to guarantee to all its citizens the equal protection of the laws." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 876 (1984) (Marshall, J. dissenting) (citing *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Bolling v. Sharpe*, 347 U.S. 497 (1954)). *See Adarand Constructors v. Pena*, 515 U.S.

200, 231-32 (1995) (upholding "important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years . . . [standing] for an 'embracing' and 'intrinsically sound' understanding of equal protection 'verified by experience,' namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.")

This Court has long recognized that the selective speech regulation of professional charitable fundraisers "necessarily discriminates against small or unpopular charities," since it is this subcategory of charities that "must usually rely on professional fundraisers." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 799 (1988).

Under the applicable strict scrutiny test, a regulation satisfies equal protection promise only if the regulation is "narrowly tailored" and "furthers a compelling government interest." *See Adarand Constructors*, 515 U.S. at 227 ("'[A] free people whose institutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." (quoting *Hirabayoshi v. United States*, 323 U.S. 81, 100 (1943)).

The panel majority below failed to consider the first requirement—that the regulations be narrowly tailored, and completely abandoned the second requirement—that the regulation be shown to further a compelling governmental interest. As noted above, the FTC did not present *any* evidence showing any government interest whatsoever fur-

thered by regulating telephone charitable solicitation by professionals. Indeed, the only "governmental interest" even mentioned by the majority is the FTC's excitement over the opportunity to regulate telephonic charitable solicitation afforded by an ambiguous provision in the Patriot Act relating to fraudulent—not professional—charitable solicitations. (It is disputed whether the subject provisions of the Patriot Act actually grant the FTC jurisdiction over non-fraudulent charitable solicitation.) The FTC's enthusiasm to regulate charitable solicitation by professional fundraisers is not, in itself, a compelling governmental interest supporting such regulation.

D. A Sample Of The Constitutional Havoc The Fourth Circuit's Decision Has Already Wrought: *Fraternal Order Of Police v. Stenehjem*

The Fourth Circuit's ink was barely dry before multiple citations to its 2-to-1 decision below turned up in a 2-to-1 decision of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*. In *Fraternal Order of Police*, two judges of an Eighth Circuit panel cited the majority opinion below as constitutional authority for the proposition that charities using professional fundraisers may be treated differently from charities using volunteers. In *Fraternal Order of Police*, the Eight Circuit upheld a North Dakota law imposing the State's do-not-call list to ban calls by charities using professional fundraisers—but not other charities—without even considering the constitutionality of applying do-not-call restrictions to charitable speech, and without any evidentiary basis for such discriminatory regulation. For these novel departures, the *Fraternal Order* majority simply cited and "join[ed] in" the Fourth Circuit opinion below, purporting to find its "analysis persuasive"—without remotely acknowledging that the "analysis" simply *abandoned* any substantive "neutral justification" requirement, in deference to *FTC jurisdiction*.

Of course, the Fourth Circuit's reliance on "FTC jurisdiction" to displace the government's First Amendment burden of demonstrating a neutral justification for discriminating among speakers—in addition to being legally wrong in its own context below—has *logically nothing whatsoever* to do with the laws of North Dakota or any purported justification for them. Nonetheless, the Eighth Circuit majority decision in *Fraternal Order of Police* incongruously cited the majority below for the strikingly generic proposition that "the distinction between professional charitable solicitors and in-house charitable solicitors" is "permissible," 431 F.3d at 598—apparently regardless of context, evidence, neutral justification, burden, or proof.

From this unlikely premise, derived from the case below and untethered to any applicable rationale, the *Fraternal Order* majority perpetuated each of the constitutional errors noted in the preceding sections. It overtly declared confusion about what standard of scrutiny properly applies to North Dakota's discriminatory ban on professional (but not in-house) charitable solicitation—even asserting that this Court has never specified what level of scrutiny applies to various regulations of pure charitable speech—and ultimately concluded that mere "intermediate scrutiny" should apply. 431 F.3d at 597. But as noted above, that is clearly incorrect; this Court applies the most exacting strict scrutiny to content- or speaker-based regulation of charitable speech. Similarly, because it apparently read the opinion below as a blanket sanction of discrimination against speech by small charities employing professional fundraisers, the *Fraternal Order* majority required no evidence from the government in support of the distinction, effectively rejecting this Court's repeated admonition that the Government bears the evidentiary burden of justifying its restrictions on fully-protected speech.

Compounding and extending these errors, in order to reconcile (in the absence of any substantive Government defense) the obvious underinclusiveness of North Dakota's

statutory exemption for larger charities with in-house outreach resources, the *Fraternal Order of Police* majority—now unfettered by the traditional requirement of neutral justification—gravitated to the proposition that such a distinction survives if it "does not give one side of a debate an advantage over the other," and it in any way reduces the number of charitable solicitations (albeit on a blatantly discriminatory basis). 431 F.3d at 598. But this Court has "expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 47, n.3 (1999) (Stevens, J., dissenting) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). And indeed, to the contrary, this Court's jurisprudence is clear that discriminatory underinclusiveness in speech regulation predicated on the identity of the speaker violates the First Amendment, absent convincing evidence of a neutral justification for doing so.[4]

Still worse, in relying on the Fourth Circuit panel majority's error in the case below, the Eighth Circuit in *Fraternal Order of Police* proceeded to vault from the (unwarranted) premise that the Government may discriminate arbitrarily against smaller charities and telefunders, to the even more extreme and novel conclusion that it may thereby treat such charitable speakers exactly the same as commercial speakers. This further leap disregarded entirely the longstanding First Amendment distinction between charitable and commercial speech, by lumping in with North Dakota's ban on com-

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[4] Moreover, even under the rejected standard, there is a strong sense in which the competition among non-profits for shares of a finite pool of donative dollars *is* a form of debate about the relative merits of different charitable causes, so that selectively impeding the ability of some charities to communicate on the merits *does* give "one side of a debate an advantage over the other."

mercial sales calls the purely charitable solicitations made on behalf of non-profit charities. This plainly contravenes the law of this Court. *See, e.g., Riley*, 487 U.S. at 796. It also denies the basis for the FTC's correct observation that regulation of charitable education and fundraising must be tailored more carefully than that of less-protected commercial speech, so as to "minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf," and requires the exemption of all charitable solicitation from commercial do-not-call regulations. 68 Fed. Reg. 4580, 4636-37 (Jan. 29, 2003). Predictably, it also sharply diverges from the law of other Circuits. *See, e.g., Mainstream Marketing*, 358 F.3d at 1233, 1236 (upholding national do-not-call list restriction on core commercial speech by noting that all charitable solicitations are clearly exempt from the restriction). And as the dissenting judge noted in *Fraternal Order of Police*, the very act of combining regulation of fully protected charitable speech with less protected commercial speech through a single, take-it-or-leave-it do-not-call list over-inclusively forces people who specifically want to avoid commercial telephone calls to sign up for a ban that necessarily comprises purely charitable communications as well. *Fraternal Order of Police*, 431 F.3d at 601 (Heaney, J., dissenting).[5]

From its reliance on the majority decision of the Fourth Circuit in *Nat'l Fed'n of the Blind*, below, a divided panel of the Eighth Circuit has now abandoned, ignored, or expressed overt confusion about multiple longstanding First Amendment principles of this Court. The alarming propagation

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[5] Because it addressed a state law, the *Fraternal Order of Police* majority decision also effectively countenanced a wholesale violation of the Equal Protection clause of the Fourteenth Amendment by permitting North Dakota to discriminate among similarly situated speakers delivering comparable protected charitable speech over the same medium of expression. The panel's opinion did not address this issue at all.

of novel First Amendment departures set in motion below should be halted in its inception.

CONCLUSION

To quell and correct the expanding errors traceable to the abandonment of the "neutral justification" requirement and other constitutional protections in the majority opinion below, the Court should grant certiorari in both this case and the Eighth Circuit's follow-on split decision in *Fraternal Order of Police*, which will be before the Court on a petition for writ of certiorari in a few weeks' time.

Respectfully submitted,

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